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1910 AND 1911

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WORKMEN'S COMPENSATION APPEALS

1910—1911.

A CRITICAL COMMENTARY ON THE WORKMEN'S COMPENSATION CASE LAW FOR THE PAST LEGAL YEAR AND BROUGHT UP TO DATE TO THE TIME OF PUBLICATION.

BY

C. Y. C. DAWBARN, B.A.,

OF THE INNER TEMPLE AND NORTHERN CIRCUIT, BARRISTER-AT-LAW, AUTHOR OF "EMPLOYERS' LIABILITY TO THEIR SERVANTS AT COMMON LAW AND UNDER THE EMPLOYERS' LIABILITY ACT, 1880, AND THE WORKMEN'S COMPENSATION ACT, 1906.'

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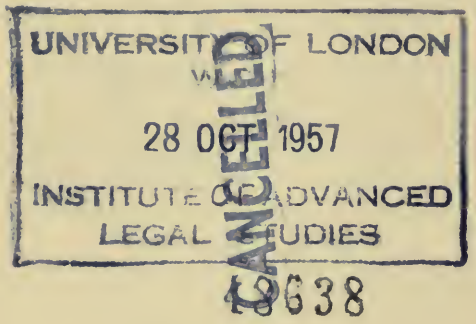

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PREFACE.

THE object of this volume is to deal with and consider all the material decisions on the Workmen's Compensation Act given in our higher Courts since the Michaelmas Term of 1910. During the past legal year over one hundred and thirty new cases have found their way into our reports and in addition during the past month or two the Court of Appeal has disposed of a further list of another seventy. With output so prodigious, noting up becomes impossible and text-books are almost out of date before well on the market. Nor does there seem any promise of much change in the future. With over four million pounds paid in a year in compensation and mostly in small sums and with the cost of appealing reduced to a minimum, there can hardly ever be a cessation of cases. Then how is this ever-accumulating mass of material to be best dealt with?

To this question it is trusted that the following pages will prove the most satisfactory answer. In them, as far as possible, I have tried to bring the law up to date, including decisions in many cases as yet unreported. For a number of these, which I was unable to hear personally, I desire to express my obligation and thanks to my friend Mr. Thesiger for kindly furnishing me with a note of them. As regards the cases, no doubt many simply duplicate others already in the books and which might well be passed without reporting, but amongst them are some of first importance. Such is that of *The Calico Printers' Association* v. *Higham*, where the redemption of weekly payments was dealt with by the Court in the most masterly way. In this case it was a pleasure to listen to judges who were highly technical, but technical not to kill but to make the Act work in the spirit as well as in the letter. We wish some principles as clear could be laid down as to how

unexplained deaths caused by accident should be regarded. At present the cases are most unsatisfactory, and our highest tribunal seems to regard it as impossible to give any guidance as to how inference from fact is to be distinguished in many instances from mere guessing. This is the more unfortunate as it is in these very cases on the line where the difficulty arises. If the fact may be inferred, liability follows, but otherwise if it can only be guessed at, and this even if the guessing fall little short of absolute conviction. And can no line be drawn? Let us suppose that it is material to prove that a window was closed when a certain army corps was passing by. If thirty successive officers each spoke to such fact we should regard it as proved. So, if every fifth one had been unobservant we should be quite ready to fill in the gap by inference and still to take it as proved that it was closed the whole time. So we would equally infer it was closed, though not so readily, if only every fourth or even every tenth officer had seen it. And finally, though perhaps with some hesitation, we might still infer it if only one officer had noticed it, though as the evidence grew weaker we should have more and more regard to the surrounding circumstances with the resulting probabilities. But had no one seen that window closed, then whatever the probabilities it would only be guessing to surmise such was the fact. Thus it would seem that where any evidence is given it should be weighed and considered in these cases as in all other cases. All evidence is a question of degree, and in principle there is no difference between a scintilla of evidence and abundant evidence. If there is evidence the arbitrator should make his award on that evidence, and it is only when there is none that it would be guessing for him to decide one way more than another.

As regards liability to deserted wives the battle between the Court of Appeal and the House of Lords may now be taken as ended by the case of *Keeling* v. *New Monckton Collieries*. It has been hard fought. The Court of Appeal has resolutely held to its opinion, dependency is in law, whilst the Lords have been as insistent it is in fact. The last word being with the Lords the victory has been with them as well. For ourselves it would

seem deplorable that an employer should be made liable to provide for a wife whom her husband in his lifetime has entirely neglected.

A still more important matter, that of the compensation to be paid in the case of partial dependency, has now been put on a sounder basis by the decision in *The Tamworth Colliery Co.* v. *Hall*, which practically decides—a rare and happy conclusion—that for once the Act means what it says.

Then another great question that has been much discussed is what is the meaning to be given to the phrase "able to earn" when fixing the weekly payment in the case of partial incapacity. But in this, as in many other matters under this Act, it is far easier to state the law than to apply it.

So at the present moment it remains open what agreement employers should make to avoid any question under sect. 1 (3) being left outstanding with the consequent risk of arbitration proceedings being forced upon them with their attendant worry and expense. The point came before the Court of Appeal, but was left undecided, as the matter went off on a side issue. Perhaps it is as well, for the question is so far-reaching that it is desirable it should be fully argued in a test case rather than be summarily dealt with in a somewhat unimportant appeal.

Here we might mention other cases, but as the one all-important case to the practitioner is the one he wants we will now leave the subject, trusting we have put him in the best way of finding exactly what he requires with the least possible trouble and in the least possible time.

C. Y. C. DAWBARN.

5, Harrington Street,
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1*st January*, 1912.

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WORKMEN'S COMPENSATION APPEALS.

ARRANGEMENT OF SECTIONS OF ACT.

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1. Liability of employers to workmen for injuries.
2. Time for taking proceedings.
3. Contracting out.
4. Sub-contracting.
5. Provision as to cases of bankruptcy of employer.
6. Remedies both against employer and stranger.
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SCHEDULES.

WORKMEN'S COMPENSATION ACT, 1906.

[6 Edw. 7. Ch. 58.]

An Act to consolidate and amend the Law with respect to Compensation to Workmen for Injuries suffered in the course of their Employment.

[21st December, 1906.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

SECTION 1.

Liability of Employers to Workmen for Injuries.

SECT. 1. Liability of employers to workmen for injuries.

1.—(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as herein-after mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

ANY EMPLOYMENT.—New Contract of Service.

SECT. 1 (1). Any employment.

A rather important point as to the employment referred to was decided in the case of *Noden* v. *Galloways*, W. N., 1911, 192. A man injured his finger in 1902 which prevented his working as a riveter. His employers gave him light work as a caulker. This he was able to do satisfactorily until 1910, when a pneumatic hammer was introduced, the use of which affected his injured hand. The Court of Appeal held that there was a fresh contract of service, and that the old accident was not an incident of the new employment.

ACCIDENT.

SECT. 1 (1) Accident.

In a Scotch case, *Kelly* v. *Auchenlea Coal Co.*, 48 S. L. R. 768, the meaning of accident was fully discussed, though one would hardly have thought there was much need for it on the facts. A miner in the course of his work fired a shot, which generated carbon monoxide, a most deadly poison, and then went to a distance.

He waited three minutes and then returned. The fumes, however, had not dispersed; he inhaled them and they caused pneumonia, which killed him. Most learned arguments were advanced to prove that the man died from disease and not from accident, but what seemed beyond discussion was that the man, not deliberately, but accidentally, inhaled sufficient gas to kill himself. He had before done something of the same sort and had suffered from headache and nausea in consequence, but it was obvious inhaling the amount he did was never intended, and his having done so was a definite act at a definite time and in no way wanting in all the attributes that lawyers say pertain to an accident.

Since the great case of *Clover and Clayton* v. *Hughes*, [1910] A. C. 242, which we will more fully refer to under *arising out of*, the actual meaning of *accident* has only been involved in two miscellaneous cases relating to frost bite, and in both of these has been left undetermined, as the cases have each gone off on another point, viz., that in neither did the accident, if an accident, *arise out of* the employment. The first case, *Warner* v. *Couchman*, [1911] 1 K. B. 351, was that of a journeyman baker whose hand was frost bitten when driving his master's cart and delivering bread; the second, that of *Karemaker* v. "*Corsican*" (*Owners of*), 4 B. W. C. C. 295, was where a seaman suffered from frost bite when at work on his ship. In the first case, Fletcher Moulton, L.J., *dissentient*, was of opinion such frost bite was an accident, and that it satisfied the test of a definite event at a definite time, and in this respect was to be distinguished from the case of *Eke* v. *Hart Dyke*, [1910] 2 K. B. 677, where a man became ill through working in drains and was held not to have been injured by accident. There are several cases where injuries caused by excessive heat have been held to have been caused by accident, and therefore the converse would seem to be logical that injury caused by excessive cold should be equally regarded an injury by accident. But in the cases relied on other elements have been present than mere heat, and these have contributed to bring the occurrence within the category of accidental, *e.g.*, *Morgan* v. "*Zenaida*" (*Owners of*), 25 T. L. R. 446, where a seaman who complained of the heat was told to continue painting

SECT. 1 (1). Accident.

in a particularly exposed position, and had sunstroke in consequence, and *Ismay* v. *Williamson*, [1908] A. C. 437, where the found fact on which this decision was given was "what killed him was a heat stroke coming suddenly and unexpectedly upon him while at work." We must note that in every case the law is laid down on the basis of the facts as found by the arbitrator, and not on what we might think they were from the fanciful account of a mere descriptive reporter. As to both these cases, see further under *arising out of, etc.*

Consequent Results due to Unreasonable Conduct.

SECT. 1 (1). Accident.

The law as to such cases seems easier to state than to apply. Whatever a man's condition and to whatever that condition is due, a man must act reasonably, having regard to that condition. A man has typhoid—is he to eat a beefsteak? Or bronchitis—is he to sleep in a damp bed? The answer is No, and in each case he must do all that he reasonably can to perfect his recovery, and this whether his condition is due to accident or other cause. If he does so act reasonably—irrespective of whether the result proves he acted for the best or not—it is clear that the final consequence is as much due to the accident as if it had at once manifested itself. On the other hand, if he acts unreasonably, takes no care, the consequences are not due to the accident, but his own folly. Of course the Court may find as a fact that notwithstanding his want of care the same result would have taken place even had he been reasonable and careful, and then the accident may still be held the cause of consequences the most remote. In *Dunnigan* v. *Cavan*, 48 S. L. R. 459, a man was injured and taken to the hospital suffering from pneumonia. He stayed there three days and then insisted on being taken home, notwithstanding the doctor's warning that his so doing might endanger his life. He persisted, with the result that he died two days afterwards. The arbitrator found for the defendant. He gave as his reason (if correctly reported) "that but for the accident Samuel Dunnigan would not have died how and when he did die." This was hardly the question, and on the appeal the **Lord President** stated it more exactly. "The true question on the merits here

is whether the man died from the accident or from a new cause which was introduced, viz., his own foolish action. . . . The Sheriff and medical referee had to face that question; and it is not an easy question. We cannot tell with certainty what would have happened had the man not left his bed at the time when he did, we cannot say absolutely either that he would have died or that he would have recovered. . . . The Sheriff has found as a fact that the death resulted from the injury, and looking at this fact—whether we would agree with him or not—I have no doubt there was evidence on which he was justified in coming to the conclusion which he has reached." A similar point was involved in *Thorburn* v. *Bedlington Coal Co.*, decided on its own particular facts.

SECT. 1 (1). Accident.

"ARISING OUT OF AND IN THE COURSE OF."

SECT. 1 (1). Arising out of.

So important are these words and so numerous the decisions on them that for a proper understanding of recent cases it will be well to state the principles generally involved.

A double condition is to be found in these words. The applicant must prove both that the accident arose out of the employment and in the course of the employment. The words are used conjunctively, not disjunctively, and are not to be used as meaning *out of*, that is to say, *in the course of*. The applicant must prove some causal relation between the employment and the accident, as well as the fact of his having been actually employed. And further, the burden of proof lies on him to establish his case, and if the evidence is as consistent with one view of the facts as another, or if no evidence be given, he does not discharge the onus and cannot recover. But in the vast majority of the disputed cases the facts to be proved are not proved directly, but are only deduced from other facts proved in the case. This is well illustrated by a quotation from "Henry VI." by the Lord President in *Mackinnon* v. *Miller*, 46 S. L. R. 299:—

> "Who finds the heifer dead and bleeding fresh,
> And sees fast by a butcher with an axe,
> But will suspect 'twas he that made the slaughter."

SECT. 1 (1). Arising out of.

Inference from Facts.

So it is as regards these inferred facts that appeals to higher courts usually take place. The Court of Appeal is bound by an arbitrator's finding of fact if supported by any reasonable evidence. They are only entitled to set it aside if there is no reasonable evidence. What is evidence or no evidence is often separated by a line of very fine drawing. Roughly there are two great classes of such cases: when the accident takes place on the actual scene of a man's duty, and when it does not.

Accident on Scene of Duty.

SECT. 1 (1). Arising out of.

In these cases the workman gets a very liberal benefit of the doubt, and very little evidence is required to warrant the inference of fact that the man was employed in doing his duty, and that the accident arose out of and in the course of the employment. A striking example of this is given in "*Swansea Vale*" (*Owners of*) v. *Rice*, 27 T. L. R. 440, heard in May last in the House of Lords. Here the chief officer of a steam vessel fell overboard between seven and eight a.m. The morning was fine and he was on duty. No one saw him fall overboard. There was evidence that during his watch he had felt giddy, gone below, taken a dose of castor oil, and had then returned to his work on deck. On these facts the arbitrator inferred that his death was due to accident, and that it arose out of and in the course of his employment. One fact was emphasised by **Lord Alverstone**: "One thing we do know here; whatever did happen, happened while the man was on duty, on his watch." So this fact, combined with there being no reason to suggest either suicide or murder, more than justified the conclusions arrived at by their Lordships, but by what principle of law—other than that hinted at by **Lord Alverstone**—this case is to be distinguished from *Marshall* v. "*Wild Rose*" (*Owners of*), [1910] A. C. 486, following *Bender* v. "*Zent*" (*Owners of*), [1909] 2 K. B. 41, and some other cases with facts more or less similar, does not appear. In the first a sailor had gone on deck on a hot night and disappeared, and it was found his widow had not discharged the onus of proving the accident

arose out of the employment. So in *Bender's Case*, when a ship was on the high seas on a calm day and the cook fell overboard and was drowned, it was held it could not be inferred the accident arose out of the employment. The House of Lords declined to analyse the difference, and **Lord Loreburn, L.C.**, said: "My Lords, I am glad that the learned counsel who addressed such concise and admirable arguments to your Lordships recognised the true value of decided cases in connection with an argument like this. Cases are really valuable in so far as they contain principles of law. They are also of use of course to show the way in which judges regard facts. But in that sense they are only useful as illustrations. Judges are not laying down the law when they are explaining their reasons for coming to a conclusion of fact, and it seems to me you have to decide each case upon its own facts. Now, my Lords, the question here being whether there is any evidence that justifies the county court judge in arriving at the conclusion which he did, I must point out that the difference between what is evidence of fact and what is merely guessing at the fact is one that cannot be defined in any formula that one can invent."

This position certainly simplifies the work of the House of Lords, but is not very helpful to those who need guidance in arriving at a decision. It is certain that another sailor, on another ship, on another calm sea, will be missing. But who is to advise his dependants of their rights. Is it to depend entirely on the temperament of the arbitrator? And who will more object than the arbitrator himself to such matters being made to depend on his temperament? He wishes to administer the law. He may rightly object to being also called upon to say what the law is. Once before, under the old Act, our higher courts took up a similar position in regard to scaffolding. Thus we had the strange conclusion that in one case it was held tressles with a board on them was a scaffold and a board on tressles was not. Of course the meaning of a word is a pure matter of law, and equally here the meaning of a phrase is a matter of law. If two cases are identical in their facts, or if as

SECT. 1 (1). Arising out of—on scene of duty.

far as facts are concerned there is nothing to differentiate between them, then the result in each ought to be the same. But as usually there will be evidence to justify either conclusion, we might easily have both decided differently, and both held to be decided correctly, and this simply for want of definite line-drawing. Tell me the law and I will apply it. This is the utmost that should be asked of any arbitrator.

Though little assistance is thus given by our highest tribunal, yet we receive more guidance from other decisions where one principle seems to emerge with considerable clearness and to operate to distinguish one class of case from the other, and it is that where a man is actually about his employer's business and is injured, it is a very legitimate inference the injury arose out of the employment. The facts found will be: the man actually doing his master's work, and his being injured. From these is inferred the further fact the injury arose out of what he was doing, that is, arose out of his employment. This is an inference that may be rebutted, but apart from such rebuttal the conclusion is no mere guessing, but is in exactly the same category as any other conclusion solely substantiated by circumstantial evidence. In the case of death each link in the chain may need testing. Thus the actual employment may not be proved by direct evidence, but can only be inferred from other facts so proved. For example, a sailor returned to the deck, and was there seen doing his duty; then from these facts might be inferred he continued doing it up to the time of the accident. So the accident itself might have to be inferred from other facts for want of direct evidence. Thus proof a man was in good health and spirits and was found drowned by the side of the vessel might afford the legitimate inference he had not committed suicide but had met his death by accident.

A case just decided fairly illustrative of these principles is that of *Richardson* v. "*Avonmore*" (*Owners of*), not yet reported. A mate acted as watchman and lived on board ship when in dock. He was found drowned, and near his body on a jetty some slight distance away there was some food he had obviously been obtain-

ing. It was also shown it was his duty and his custom to attend to the ropes of the ship. These facts furnished abundant foundation to warrant the inference of the further fact the accident arose out of the employment.

SECT. 1 (1). Arising out of—on scene of duty.

So a similar inference of fact was found in *Furnival* v. *Johnson Iron and Steel Co.*, where a workman went to get some tools sharpened, was almost at once missed, and was found in the canal by which he might naturally pass. There was evidence he was young, healthy, and on good terms with his wife, and therefore there was no reason to suggest suicide. So **Farwell, L.J.**, pointed out that the legal presumption is against crime, and therefore against suicide. This, therefore, throws the burden of proof on those who suggest suicide as also murder.

Accident Presumed on Scene of Duty.

SECT. 1 (1). Arising out of—presumed on scene of duty.

So akin to this is where there is a death due to an undoubted accident, and yet there is a doubt as to where the accident really occurred. It is not open to an arbitrator to think it probably occurred at one place more than another and find accordingly. His finding, whatever it may be, must be always based on evidence. The leading case is *Mitchell* v. *Glamorgan Coal Co.*, 23 T. L. R. 588. Here a miner injured his finger, and died from blood poisoning. It was unexplained how he injured it. Possibly the only evidence would have been what he told his wife or doctor, which was not admissible. (See also Sched. II. (4).) But it was proved he left home and reached the mine with it all right, and that when he again reached home it was crushed. From these facts the arbitrator inferred he was injured when at work, and the Court of Appeal held he was justified in so doing. But equally he would have been justified in finding the reverse had he felt the evidence warranted it. But in two recent cases, *Wood* v. *Davies*, not yet reported, and *Jenkins* v. *Standard Colliery Co.*, 28 T. L. R. 7, where two colliers both died from blood poisoning caused by injuries, and it was not known when the injuries occurred, the arbitrator found in favour of their dependants on the ground that it was more probable the injuries

SECT. 1 (1). Arising out of—presumed on scene of duty.

had been caused when they were at work than when they were elsewhere. Further, he gave as the reason for his decision that he held himself bound by this *Mitchell's Case*. This clearly was not the true reading of the decision. In this case the arbitrator had definite facts established from which he could, and did, infer other facts, and no colour is given to the suggestion that under any conditions an arbitrator may merely guess at what he thinks the probable cause.

But what is the legitimate inference to be drawn when it cannot be proved or inferred that a man though on the scene of his duty was actually about his master's work? What is the position then? What will be the facts found? A man who may or may not have been about his master's business is found dead. Then it must be pure guessing to say his death arose out of his employment.

When the man was obviously not doing his master's work there is no trouble, though once again difficult questions arise when he was doing acts which, though not exactly work for his master, were yet more or less essential to enable him to do such work. These, however, form a new class of case, on which there has been no decision hitherto, and which will demand independent discussion as they occur.

Accident not on Scene of Duty.

SECT. 1 (1). Arising out of.

In *Rose* v. *Morrison*, 4 B. 277, one of a gang of men going from one place to another stayed behind to relieve himself. He went into a hoist, an admittedly improper place, and was killed. It was held his employers were not responsible. "The man had no right to go into the place he did and to expose himself to a wholly unnecessary risk," *per* **Cozens-Hardy, M.R.** So a similar decision was given in the Scotch case of *Thomson* v. *Flemington Coal Co.*, 48 S. L. R. 740.

When Accident in Course of Employment.

SECT. 1 (1). Arising out of.

We have now to consider the case of *Astley* v. *Evans*, [1911] 1 K. B. 1036. Here a train of two trucks pushed by an

SECT. 1 (1). Arising out of—when in course of.

engine overtook another train on the same metals and the two trains ran buffer to buffer as if coupled. The brakesman of the rear train tried to get on the first train, but slipped between the buffers and was killed. There was no direct evidence why he tried to board the first train, but there was evidence he would shortly have to alight to move some points, and that it would have been easier for him to alight from the front train, which had steps, than from the rear train, which had none. The arbitrator on these facts found for the dependants of the deceased workman. The case is very near the line, and probably whichever way the finding had been it would have been accepted. The man was undoubtedly killed by accident in the course of his employment. Then there was evidence he was actively engaged in his duty, and though guilty of doing a stupid thing there was evidence he had to move some points, which he could more conveniently do from the front train, and this was certainly some evidence from which the arbitrator could infer the further fact he was still continuing in doing his duty when he tried to pass from one truck to another. Equally it would seem he might have found such evidence did not suggest such inference, but on the whole it would seem with less reason. This was the view taken by **Cozens-Hardy, M.R.**: "I cannot see any ground for supposing that this was an act done by the deceased for his own will and pleasure or for any other purpose or motive than to discharge, in, it may have been, an improper mode, his duty as brakesman. . . ."

This case has now been approved by the House of Lords and mostly for the reasons given. "It was indeed argued here . . . that in going from the truck to the van he quitted his employment, and that he was not employed to do what he did. The answer is, that he was all the time doing what he was employed to do, though in the wrong way," *per* **Lord Loreburn, L.C.**

Lord Atkinson (*dissentient*), in a very strong judgment, took a counter view of the evidence, which, in his opinion, as much pointed to the man trying to get into the guard's van to have a chat with the brakesman as to do any special work of his own.

SECT. 1 (1). Arising out of—when in course of.

To this **Lord Robson** replied: "On the other hand the appellants say, and it is of course possible, that the deceased may have been getting into the brakes van merely to waste his time in the society of the brakesman. That, however, would have been a wrongful intention on his part, and as such it is not lightly to be presumed against him. Where a workman is killed in the course of his employment while engaged in some act reasonably consistent with his master's service, I think it requires some more definite evidence than the appellants can suggest in this case in order to found the inference that he was moved by a wrongful intention." In fact, so far as one can judge from the reports, there was no evidence whatever, only pure guessing—possibly justifiable guessing—to warrant such conclusion.

The Scotch Courts have gone one better on this case, for they have held that where a man riding on a waggon dropped his pipe and in jumping down to recover it fell and was killed, his widow was entitled to recover: *M'Laughlin* v. *Anderson*, 48 S. L. R. 315.

Acting Unreasonably in Course of Employment.

SECT. 1 (1). Arising out of—when in course of.

In *Keyser* v. *Burdick*, 4 B. 87, the employers disputed liability on the ground their workman had acted unreasonably. He was a riveter working on a ship in dock. When he came on deck he found the vessel was being removed to a dry dock, and was already a short distance from the quay. The gangway had been removed and there was no other way of getting ashore than by slipping down a rope which a fellow-workman had safely attempted. When he tried to follow, the rope gave way and he was injured. On these facts the arbitrator found for him, and the Court of Appeal confirmed his award. So in an Irish case where a seaman in jumping on board his ship hurt himself: *Kearon* v. *Kearon*, 45 Ir. L. T. 96.

SECT. 1 (1). Arising out of—when in course of.

Risks Not Specially Incident to Employment.

We have now to consider the somewhat important case of *Pierce* v. *The Provident Clothing and Supply Co.*, [1911] 1 K. B.

997, which is by no means as simple as it appears to be. Here a collector for the company used a bicycle to visit their customers. When doing so he was killed in a street accident. The Court of Appeal, reversing the decision of the arbitrator, found the accident arose out of as well as in the course of his employment, and adopted the reasons given in the almost identical case of *McNeice* v. *Singer*, [1911] S. C. 12, decided by the Court of Session. Here a salesman, also riding on his bicycle, was kicked by a horse and injured. In this case the learned president held that street dangers were a risk incident to such employment, and that he had suffered from such risk, and that it arose out of the employment. SECT. 1 (1). Arising out of—when in course of.

The difficulty involved in the last case becomes more apparent when we consider the next two. It will be remembered that under *Accident* we have referred to the two cases of *Warner* v. *Couchman*, [1911] 1 K. B. 351, and *Karemaker* v. "*Corsican*," 4 B. 295, in both of which compensation was sought to be recovered on account of injuries caused by frost bite. Without determining whether such injuries could be held to have been caused by accident, both cases were dismissed on the ground the accident, if an accident, did not arise out of the employment. This is undoubtedly a very difficult point to determine, and the case is an extremely interesting one to argue from both sides. Thus it is clear excessive cold is not limited in its effects; every one is liable to suffer from it, and it is not peculiar to any particular employment. As put by **Cozens-Hardy, M.R.**, "it is not enough for the applicant to say the 'accident would not have happened if I had not been engaged in that employment, nor if I had not been in that particular place.' He must go further, and must say, 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.'" This, he was of opinion, could not be said in the case of the baker simply going his round delivering bread.

On the other hand **Fletcher Moulton, L.J.**, *diss.*, was of opinion

SECT. 1 (1). Arising out of—when in course of.

it could. "The man's employment required him to go his rounds on this bitterly cold day and deliver the bread. . . . This involved exposure to the right hand, and it was this exposure which brought on the frost bite." The finding of the arbitrator was "there was nothing in the nature of the applicant's employment which exposed him to more than the ordinary risk of cold to which any person working in the open was exposed on that day. He adds that one fact only was relied on, viz., that he had to take off his right-hand glove in order to give change, and that this, though probably convenient, was not necessary." But the learned judge's point was that it was the man's employment that took him into the open, but "if the accident was merely a consequence of the severity of the weather to which persons in the locality, whether so employed or not, were equally liable," it might also be held not to arise out of the employment. "The true issue," he added, "could not be better expressed than by the Irish Court of Appeal in *Kelly* v. *Kerry County Council*, 1 B. 194, when dealing with the question arising out of the death by lightning of a man working on the road. They found that the accident did not arise out of the employment, because there was no evidence that in following his employment, he ran any greater risk of being struck by lightning than any other person within the area of the storm. But when a case arose of a man who by reason of his employment was exposed to the danger of lightning to a greater degree than any other person within the area of the storm, this Court in *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K. B. 32, held that the accident arose 'out of' the employment."

It will be observed that in all these cases the argument for the employer was, the man was not exposed to accident more than any other member of the public moving in similar circumstances, and that in one case the argument was accepted and in the other was not. What is the distinction? It certainly appears to us as sound that if a man is going on his master's business on a bicycle and is knocked down that the accident arose out of the employment; and if frost bite is an accident, why not the

same conclusion? Is it there seems a want of direct causation? Being knocked down is a direct act connected with the very work itself, whilst one's feeling as to the frost bite is that it merely happened *during* the employment and without any very particular or necessary connection with it. No doubt the point is an extremely difficult one, and probably cannot be better dealt with than in the judgment of Collins, M.R., in *Andrew* v. *Failsworth*, [1904] 2 K. B. 32, where he says: "If there is, under particular circumstances in a particular vocation, something appreciably and substantially beyond the ordinary normal risk which ordinary people run, and which is a *necessary* concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment." This is a very fine piece of judicial distinguishing between cases just on the line, and one falling one side and one the other. Still, whether it absolutely covers these facts must remain a matter of doubt.

SECT. 1 (1). Arising out of—when in course of.

Warner v. *Couchman* has now been approved by the House of Lords. The Lords are particularly insistent on accepting the finding of fact as made in the first instance by the arbitrator whenever there is any evidence to warrant it. Then, referring to Fletcher Moulton's, L.J., judgment, they held they were concluded by the fact found by the county court judge, the man had not been so specially affected.

Andrew v. *Failsworth* has again been followed in *Davies* v. *Gillespie*, where similar facts had to be considered.

Causal Relation.

To recover applicants must establish a causal relation between the employment and the accident. The courts have taken a fairly liberal view of such relation when a man has intended to act in the interest of his master, but this will not justify a boy cleaning machinery in motion when it was no part of his work to touch it (*Naylor* v. *Musgrave Spinning Co.*, 4 B. 286), nor an attendant in a power-house who was injured in attempting to dust a switch-board which he had been forbidden to touch (*Jenkinson* v.

SECT. 1 (1). Arising out of.

SECT. 1 (1). Arising out of—causal relation.

Harrison, 4 B. 194), and *à fortiori* a woman who met her death through mere curiosity by trying to work a machine she had nothing to do with (*Cronin* v. *Silver*, 4 B. 221), and a lad who through larking started a machine and injured himself (*Cole* v. *Evans*, 4 B. 138). So also in *Barnes* v. *Nunnery Colliery Co.*, 4 B. 43, where a boy in a colliery at some distance from his work rode in a tub on an endless rope to get to it and was killed, the applicants failed, as riding in such tub had been expressly forbidden. Though the rule was habitually disregarded, this did not any the more alter the fact the act had nothing to do with the work the lad was employed to do, and as **Cozens-Hardy, M.R.**, put it, "We must carefully distinguish between any negligent doing of what was authorised and doing something wholly unauthorised."

This distinction is well exemplified in the case of *Harding* v. *Brynddu Colliery Co.*, [1911] 2 K. B. 747. Here a collier was set to drill a hole from above a seam in order to draw off dangerous gases which rendered the seam unsafe. In this work it is admittedly difficult to judge whether the drill is going in the right direction, and the man asked if he might go into the seam to see if it was running straight and he was told, No! But he went all the same and was suffocated in consequence. Here he was clearly disobedient, but this did not alter the fact that though disobedient he was still actively doing his best to do the very work he was engaged to do, viz., drill the hole. The accident arose undoubtedly out of his trying to do such work, and as the disobedience was no defence, death having resulted, his employers were held liable. There is a great difference between doing a right thing in a wrong way, or a way actually forbidden, and in doing a thing wrong in itself, and therefore, though **Buckley, L.J.**, disagreed, it would seem this decision is on the whole warranted by the facts. The same conclusion was also arrived at in *Mawdsley* v. *West Leigh*, not yet reported, where a man whose business it was to oil machinery when it was stationary did so, though forbidden, when it was in motion, and was killed. This is further well illustrated by two Scotch cases. In a mine a

certain part became dangerous, and the usual notice to this effect was put up. Notwithstanding this, a miner wanting a pick he had left there, went for it, and having a naked light in his cap, it caused an explosion, and he was killed. The arbitrator found against his dependants, but on appeal the **Lord President** held that the man was in the course of his employment doing a thing to further his master's work, and not for any purposes of his own, and though in his conduct he was flagrantly disobedient, yet it could not alter the fact the accident arose out of his employment (*Conway* v. *Pumpherston Oil Co., Ltd.*, 48 S. L. R. 632), but in the other case, where a miner went out of his way to fire a shot, which was no business of his to do, and which the rules of the mine required to be always done by one man specially appointed in writing for the purpose, it was held that the accident which resulted did not arise out of his employment (*Kerr* v. *Baird*, 48 S. L. R. 646).

SECT. 1 (1). Arising out of—causal relation.

The Court had no difficulty with the case of *Weighill* v. *South Heaton Coal Co., Ltd.*, 4 B. 141. Here a miner employed to cut a road through the coal, to increase his wages, cut coal from a finished part of the road seventy yards away. This undermined the supports and caused a fall which killed him. Obviously such conduct had nothing whatever to do with the work he was engaged to do, and therefore the accident did not arise out of his employment. See also under *Serious and Wilful Misconduct*, Sect. 1 (2) (c).

Accident to Volunteer.

The same rule applies to a volunteer even though his act be most meritorious if it is really no part of the service he was engaged to perform. Thus a patient in a hospital had to be treated by X-rays. There being no one experienced in their use, the house surgeon allowed himself to be experimented upon and was injured. Without deciding whether he was a servant or not, it was held the accident did not arise out of his employment (*Curtis* v. *Talbot*). This case seems clear, but not so clear the case where a "workman," sent on an errand, slipped on a banana skin, fell,

SECT. 1 (1). Arising out of.

SECT. 1 (1). Arising out of—volunteer.

and broke his thigh. Thus in *Smith* v. *Morrison* the master sent his servant to a local post office, when being too late he hurried on to the general post office, slipping and hurting himself as mentioned. The arbitrator held, slipping on a banana skin was not a danger especially incident to him in his employment, and therefore found the accident did not arise out of it, and added, if he thought it did not arise out of his employment when going to a place where he had been sent, it was an *à fortiori* case that it did not arise out of it when going to a place to which he had not been sent. This the Court of Appeal took as a finding of fact that the man when injured was virtually acting as a volunteer, *per* Farwell, L.J., and dismissed the appeal on the ground that the accident did not arise *in the course of* the employment. This decision is hardly satisfactory. The primary business of the man was to do his master's errand, and whether at one post office or another was hardly material. If he had returned without doing so he would have been rightly blamed as a simpleton without an ounce of initiative. However, there is a strong tendency for the moment for the Court of Appeal to require men who want compensation for accident to do the thing they are told, and in the way they are told. Perhaps this is right. If masters are to be responsible in serious amounts for mishaps to their men they may well ask to be consulted, not only as to what is to be done but the manner also in which it is to be done. Still this hardly applies to a simple duty like doing an errand at one place when unable to do it at another. So the fact the servant had to hurry because of his employment certainly made his risk of slipping on a banana skin greater than that of one of the ordinary public, and on the whole we think the man had hard measure dealt out to him, and if the House of Lords varied the award, we think they could find abundant justification for so doing.

As to Injuries Aggravated by Disease.

SECT. 1 (1). Arising out of.

On this the leading case is *Clover and Clayton* v. *Hughes*, [1910] A. C. 249. Here a man in the last stage of heart disease died

SECT. 1 (1). Arising out of—aggravated by disease.

when screwing a nut on to a bolt. The logic of the decision was preserved by the finding of fact that the screwing on of such nut caused an extra strain, which extra strain ruptured the artery which caused his death. The extra strain thus rupturing an artery which was on the very verge of breaking was as much an accident as if the extra strain which had ruptured an artery had been the violent fight for life of a man suddenly overwhelmed by a crushing avalanche. Only a question of degree. An accident is no less an accident because most serious. A pin scratch is an accident; its usual result is a temporary smart, but if the man suffer from diabetes it may easily kill him. But this does not make the scratch any less an accident. But in relying on this case it must not be forgotten there was the finding of fact, the extra strain which ruptured the artery was actually caused by the work which the man was actually doing. The chain was complete. Where the chain is not complete the applicants must fail. In *Barnabas* v. *Bersham Colliery Co.*, 4 B. 120, a miner died of apoplexy in a mine; no one was in a position to see him, but they could hear him working and whistling. They heard him ask the time. They knew what he was doing. He was building a pack, work involving considerable exertion. All of a sudden he ceased work and vomiting was heard. After a time some one went to look and found him in a fit of apoplexy. On these facts it was held that there was no evidence that he was seized when incurring a strain. It was simply guessing to find that the death was more due to an accident than to natural causes. As the man was a great chewer, **Fletcher Moulton, L.J.**, suggested it might well be that a little of the saliva of the chew went the wrong way; the workman coughed and apoplexy followed. In giving judgment, **Cozens-Hardy, M.R.**, said: "An applicant has thrown upon him the burden of proving that his injuries arose from an accident that arose out of and in the course of his employment. The applicant has the burden of proving this not necessarily by direct evidence; for it is quite well established that inferences of fact may be drawn by the Court. But when the facts are such that it is equally probable that there was not

SECT. 1 (1). Arising out of—aggravated by disease.

an accident arising out of and in the course of the employment, then he cannot succeed."

This view of the law was upheld in the House of Lords, where **Lord Loreburn, L.C.**, said: "The plaintiff must prove his case; and although he may establish a state of facts which lead one to think that his version is quite a possible version of what took place, he must do something more than show a state of facts which is consistent either with one view or another view."

Clover and Clayton v. *Hughes* was relied on and followed in the case of *Trodden* v. *Lennard*, 4 B. 190. Here a watchman on a vessel had to use a rope ladder. When on it, the ladder gave a sudden twist and he was heard to shout, "I'm done for." He fell into the water and was picked up dead. The evidence showed his heart was in a bad state and, medically, it seemed probable he died before reaching the water. It was shown that the sudden twist of the rope was enough to cause an extra strain and so bring on such heart failure. On these facts the arbitrator found for the applicants and was approved by the Court of Appeal.

Injuries Aggravated by Disease and Causal Relation.

SECT. 1 (1). Arising out of.

If an undoubted accident occurs it is equally incumbent on the applicant to prove the connection between such accident and the resulting injuries. Thus take the case of *Honor* v. *Painter*, 4 B. 188. Here a carman fell from his van and sustained injuries. He died three weeks later. No evidence was produced to show the connection between the accident and the death, and the finding of the arbitrator in favour of the dependants was set aside. "The man," said **Cozens-Hardy, M.R.**, "was taken away to the hospital after having fallen off his cart in what looked like a fit—it may not have been—and he died three weeks later. The dependants have to make out that the death was due to an accident. There was no medical evidence as to what he died from and none of the witnesses were in a position to say that his death was due to the fall from the cart and it seems impossible for us to get over that. We said yesterday,

SECT. 1 (1). Arising out of—disease and causal relation.

and it is not necessary that we should say it again, that the applicant in cases of this kind must not merely ask the Court to guess that the accident was the cause of death, must not merely say it is probable it was, but must either prove it by evidence or by legitimate inference to be drawn from the facts proved or admitted. There is no evidence, and there is nothing which justifies the Court in drawing an inference here. It is quite possible, and quite probable, that the death which this man met with three weeks after the fall from the cart was not in any way due to the accident, but may have been due to other physical conditions." So for the same reasons a similar conclusion was arrived at in the case of *Browne* v. *Kidman*, 4 B. 199, where the facts were as nearly identical as facts can be. There was the same unexplained fall from a hay-cart with, in addition, the doctor's evidence that the man's death was probably due to cerebral disease and syncope. Again the appeal of the employers was allowed. Again the Court laid down: "There must be something more than surmise, conjecture or guess, something which gives the actual cause." So in *Farmer* v. *Stafford*, 4 B. 223, a man at work called out that he had hurt his back. He was taken home complaining of pains in his back and stomach. He died a week later of intestinal obstruction, and there was some evidence of previous illnesses and previous pains in the stomach. On these facts the arbitrator found that it was not proved to what the fatal obstruction was due, and found for the employers, and in this was upheld by the Court of Appeal. Equally when a workman collapsed at work and died from *angina pectoris*, the Court found the dependants had not proved the accident arose out of the employment. Here the facts certainly approximated very closely to those of *Clover and Clayton* v. *Hughes*, *supra*. The deceased, an elderly man, had been helping to push trucks up an incline and to then tumble them off the rails, and this finished, had begun shaping props. Whilst thus engaged he was taken ill and had to stop. After resting, he went home and died the same evening of *angina pectoris*. The arbitrator found the man had over-exerted

SECT. 1 (1) Arising out of—disease and causal relation.

himself pushing or tumbling a truck, and had thus brought on the heart attack, and found for the dependants. But the Court of Appeal, assuming an accident, were not satisfied there was anything in the circumstances of the work to justify the inference that the death arose out of the employment. **Cozens-Hardy, M.R.**, said the evidence of the doctors may be summarised thus:—"The arteries were all in a bad condition of long standing. *Angina pectoris* may be brought on in a variety of ways. It may be due to circumstances which can scarcely be called an accident at all. A man walking in a strong wind may meet with death from *angina pectoris*. It may be due to walking upstairs or to very slight exertion. It does not always come on immediately after exertion. You cannot predicate that exertion will immediately or within any definite time result in the attack. In that state of things, it is impossible to say that this *angina* was due to the not unduly heavy work the man had done that day. It may be due to some other cause—exertion elsewhere or at some other time. It is impossible to say that the test laid down in *Barnabas' Case* has been satisfied. The onus of proof has not been discharged, the learned judge below was not entitled to speculate, which is what, with great respect, he has done" (*Hawkins* v. *Powells Tillery Steam Coal Co.*, [1911] 1 K. B. 988).

Similar considerations warranted the conclusion in *Ashley* v. *Lilleshall Co., Ltd.*, where death was undoubtedly due to Bright's disease and where at most the acceleration of death was due to the accident if an accident.

The case of *Groves* v. *Burroughes*, 4 B. 185, hardly needs mentioning. A man had a bad wound, scarred over. In exerting himself he broke it open; profuse bleeding followed, resulting in death. The dependants were clearly entitled to recover.

Duration and Suspension of Employment.

SECT. 1 (1). Arising out of.

In several cases this point has been involved. In *Molloy* v. *South Wales Anthracite Colliery Co.*, 4 B. 65, a workman a few days after leaving his work, according to the employers, was given leave to go down into the mine to fetch his tools, but,

SECT. 1 (1). Arising out of—suspension of employment.

according to his evidence, was ordered to do so. Doing this he was injured. The arbitrator's notes agreed with the employers' evidence, his finding with that of the man. On this it was held he was entitled, and the Court of Appeal were unable to do anything to help the employers. Why they could do nothing does not appear, nor does it appear very clearly why orders which the man could or could not obey as he liked should affect the legal position. The employment ended, his right was an action in trover if the company would not return his tools or let him get them. In *Phillips* v. *Williams*, 4 B. 143, a collier had a dispute about his wages and was referred to the under-manager, who could be seen on the following Monday. On that day he did not go to work, but went in his Sunday clothes to see the manager, and on his objection not being satisfied he declined to work any longer. On leaving, and before quitting the premises, he was knocked down and killed. The arbitrator found for the employers, and the Court of Appeal agreed with him, because he was there in his own interests and not in those of his master. A more difficult case is that of *Riley* v. *Holland*, [1911] 1 K. B. 1029, where a mill hand was injured when fetching her wages after her employment was ended. It was the usage for wages to be made up to the preceding Wednesday and paid on the Friday. Her employment terminated on the Wednesday, but, as usual, she had to go on Friday for her money. On these facts the Court was divided as to whether the accident arose out of and in the course of the employment. **Cozens-Hardy, M.R.**, thought "it is a fallacy to assume that the employment ceases necessarily when actual work ceases. . . . Though her employment was at an end on Wednesday night in the sense that she had ceased work under the contract, yet the employment continued because of the obligation of the employers to her arising out of the employment and continuing until Friday afternoon." On the other hand, **Buckley, L.J.**, dissenting, held on the facts the employment had come to an end, for "when the last obligation of service to be rendered and accepted had been discharged and all that remains is a debt from the master to the servant for the wages

SECT. 1 (1). Arising out of—suspension of employment.

of service, employment, I think, is over, and the only relation is that of debtor and creditor." This seems sound law, but does it quite cover the facts, for really was not fetching the wages an incident of the employment, and was the employment really ended for all purposes so long as such incident remained outstanding? If, then, so far the employment was not ended, and if in thus fetching the wages the accident happened, did it not both arise out of the employment and in the course of it?

Suspension of Employment in the Case of Seamen.

SECT. 1 (1). Arising out of.

The view taken by the Court of Appeal has been that, when sailors go ashore for purposes of their own, or having gone on shore for purposes connected with their employment remain on shore for purposes of their own, the employment must for such period be regarded as suspended. No doubt the contractual relation between the parties is usually for a term, but there is no reason why such relation should not temporarily be interrupted by mutual consent whether express or implied. In *Moore* v. *Manchester Liners*, [1910] A. C. 498, **Moulton, L.J.**, in a dissentient judgment, ultimately approved by the House of Lords, expressed the view that as long as sailors went ashore with leave there was no break. This view was not particularly material, as the case turned on whether the accident should be regarded as arising out of the employment. The very discussion of this assumed that it must have been in the course of the employment, and whether this was due to the employment having been resumed or never suspended, the effect would be the same. In fact this applies to all the cases, as each has been decided for the reason the accident did or did not arise out of the employment, and, as **Farwell, L.J.**, neatly put it in *Kitchenham* v. *S.S.* "*Johannesburg*," [1911] 1 K. B. 523, "Many accidents occur in the course of but not out of the employment, but I am unable to think of any that could arise out of and not also in the course of the employment." For this reason the point has never been fought out as the point on which a case turned, but since the decision in the House of Lords in the cases of *Kitchenham* v. *S.S.* "*Johannesburg*," 4 B. 311, and in

SECT. 1 (1). Arising out of—suspension of employment in case of seamen.

Fletcher (*formerly Hewitt*) v. *S.S.* "*Duchess*," [1910] 1 K. B. 772, it must now be considered covered by authority that when seamen go ashore with leave there is no suspension of the employment. In both cases the judgment of the Court of Appeal was supported. In *Kitchenham's Case* a seaman had been ashore with leave, was returning to his ship, was seen going on the quay, but was not seen to board the gangway, nor was there any evidence that he reached it. Simply a splash was heard, there was a cry of "man overboard," and he was drowned before he could be rescued. The **Lord Chancellor** delivered the judgment agreed to by all the Lords: "In the present case we are to say, first, Was this accident in the course of the employment? I think it was. The return of the man to his ship was in the course of his employment. We are next to say whether the accident arose out of his employment. I think not. Upon the finding of the county court judge, which he states while at the same time giving his view of the law, I think it arose from a risk common to every one, namely, falling from a quay into the water, and was not specially connected with the man's employment." Again, in *Fletcher's Case* a captain left a ship and went to an hotel 100 yards from the quay. On returning, he hailed his ship for a boat, but before it reached him he fell into the water and was drowned. The evidence was equally consistent with his having gone ashore for his own purposes as for purposes connected with his duties. Again **Lord Loreburn, L.C.**, delivered the judgment, with which the other Lords agreed: "My Lords, the question argued before your Lordships was, that this accident, which proved fatal to the unfortunate master of the ship, arose out of his employment. He fell over the quay into the water when waiting to return to his ship. It was not established that he had to go ashore on the ship's business. I think that the risk from which he perished was not one specially connected with his employment such as might be a risk from crossing a plank or a gangway leading to the ship or going in a boat to the ship. In these circumstances I think that the conclusion at which the Court of Appeal arrived was

SECT. 1 (1). Arising out of—suspension of employment in case of seamen.

right and that this appeal ought to be dismissed." On the question of arising out of apart from in the course of the employment, these decisions are extremely useful. Instead of the inquiry, Was this man on a ladder or on his ship, the Lord Chancellor took the broad, commonsense view that the accident was not one specially connected with the employment, and was a risk common to any one having business on a quay.

At the same time it would not be advisable to press too hard to its logical conclusion the fact that the accident took place in the course of the employment. One would think he might argue that if a man in the course of his employment did an act for no purpose of his own but solely for purposes of his employment, that such an act arose out of his employment. If in the course of his employment a man is in one place and for purposes of his employer he is trying to get to another, it would seem such trying would be an act arising out of the employment. But not so always, and these cases have been decided exactly as they would have been had it been held the employment in each instance had been suspended and had not been resumed when the accident happened. So the theory of suspension of employment is so general to the whole of the Act as hitherto interpreted that it seems a pity it should have been invaded. Those wishing to contest the invasion cannot do better than study the apparently unanswerable argument of **Farwell, L.J.**, in *Kitchenham's Case*, to which we have before referred.

The case of *Leach* v. *Oakley*, 4 B. 93, needs no comment. A seaman with leave had gone on shore for his own purposes. He was returning, and to do so had to pass over a gangway between his ship and another. The gangway gave way and he was drowned. On any view his employers seem rightly to have been made liable.

Facilities for Coming to or Leaving Work.

SECT. 1 (1). Arising out of.

A long string of authorities in the Court of Appeal received their approval in the House of Lords in the case of *Walters* v. *Staveley Coal and Iron Co.*, 55 S. J. 579. In this case the respondents permitted their men to use a short cut to their work over a

footpath that belonged to them. On passing over it a workman was injured, and he sought compensation on the grounds that the path was provided by the employers for their men's use, and that when he was injured on it his injury arose out of and in the course of his employment. So to bring the case within *Cremins* v. *Guest*, [1908] 1 K. B. 469, he alleged contract. Here a mining company provided a train for their men, and in a rush one of them was pushed off the platform and killed. **Cozens-Hardy, M.R.**, found the company liable, and said he based his judgment on the implied contract to provide such carriage. But in *Walter's Case* neither the Court of Appeal nor the House of Lords could find any such contract, and held that there was only leave and licence to use the path if the men chose, and that they could reach the scene of their employment—which the path was not—in any way they pleased. In *Gilmour* v. *Dorman*, 4 B. 279, the facts were very similar and the result was the same.

SECT. 1 (1). Arising out of—Facilities for coming to or leaving work.

A similar question arose in *Parker* v. *Pont*, not yet reported. Here a farm labourer, working on F. farm, wished to see his employer, who lived near K. farm, and to go there tried to get on one of the empty dung-carts to have a ride part of the way. As he was doing so the horse started and he was thrown to the ground and injured. It was held it was no part of his contract of service to use the cart and to unnecessarily add to the risk of his employer. See also remarks under sub-heading *Accident to Volunteer*.

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(2) Provided that—

(*a*) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed:

SECT. 1 (2) (a). Disabled one week.

(*b*) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the

SECT. 1 (2) (b). Alternative remedies.

SECT. 1 (2) (b). Alternative remedies.

employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

PROCEEDINGS INDEPENDENT OF ACT.

SECT. 1 (2) (b). Alternative remedies.

This section preserves to a workman his rights against his employer other than under the Act, with the proviso, a man shall not be paid twice. But what the Courts seem determined upon is that parties who can agree and want to agree shall not agree outside the Act, and so once and for all settle their differences to their mutual satisfaction. As for this section, any deliberate intent to rely on it is to be deemed fraudulent, whilst its only use seems to be to catch tripping the innocent and unwary. Why the State is to act nurse to people who do not want nursing, to people who are competently advised by competent solicitors, is difficult to understand, but such seems the case. We can all manage other people's affairs so much better than they can themselves.

In *Howell* v. *Bradford*, 104 L. T. 433, no doubt for the very purpose of avoiding the benevolence of the Act,—and why parties should not seek to avoid its benevolence one fails to see—an employer and his workman agreed to settle for damages instead of compensation. The whole matter seems straight as could be. The man was well advised by his own solicitor, and with his approval he elected to enforce his rights under the Employers' Liability Act, 1880, and properly settled for 84*l.* 12*s.* So that there should be no doubt about his understanding exactly what he did, a receipt as follows was written out and signed by him personally: "The above discharge has been read over by me or to me, and I fully understand that by electing to receive compensation under the Employers' Liability Act, 1880, no claim can hereafter be brought under the Workmen's Compensation Act, 1906." This receipt was stamped with a penny stamp, and was witnessed by his doctor and the clerk to his own solicitors.

Yet on these facts the arbitrator found there had been no

SECT. 1 (2) (b). Alternative remedies. Dependants' independent claim.

bonâ fide exercise of the option, and accordingly when the dependants claimed compensation under the Act—for under the Act their rights are independent of and not derivative from the workman through whom they claim, and, may be, the very intention of settling under the Employers' Liability Act was to get rid of their rights, as both parties were perfectly entitled to do—he found for them in a further sum, which was about as flagrant a case of being charitable with other people's money as has ever been recorded. As reported, what tittle of evidence was there that the settlement was not *bonâ fide*. "I am told," said **Cozens-Hardy, M.R.**, in the Court of Appeal, "that it has been held, and I agree, that if a workman makes his claim under one Act or the other, and the claim is paid, that he has then taken proceedings. But that was not what had taken place here, because there had been no claim in proceedings under either Act." How this conclusion harmonises with the fact that 84*l.* 12*s.* had actually been paid is difficult to understand. When damages are involved there may be claims without payment, but whoever heard of payment without a claim?

The case of *Hawkes* v. *Cole*, 3 B. 163, was perhaps a colourable device to evade the Act, as negotiations were carried on under it, and only at the last moment was a receipt given under the Employers' Liability Act, and in that case **Cozens-Hardy, M.R.**, said he hoped such methods of evading the Act would not become general. Certainly not by such methods, but why not generally, as he seems to suggest? Here is not the place to discuss the merits of an Act which has probably done more harm to the honest worker than any other Act ever placed on the statute-book. The old, the infirm, the injured are all penalised by the insane clause against contracting out and as regards cost: There is not an insurance company but will tell you it has had to double and treble its premiums because of the frauds they are subjected to. And who in the end has to find the extra premiums? The master? the public? No, but the honest worker. Why have wages been stationary the last few years in so many trades. Because what a man receives in doles

SECT. 1 (2) (b). Alternative remedies.

he loses in cash. You can legislate, you can agitate, you can talk, but you can never check the irresistible force of economic law. You may as well try and stop a glacier with an alpenstock. Then why, when parties do try to get over some of the absurdities of the Act, are they to be hampered at every turn?

SECT. 1 (2) (c). Serious and wilful misconduct.

(*c*) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed.

SERIOUS AND WILFUL MISCONDUCT.

In *Weighill* v. *South Heaton Coal Co.*, a collier's work was to cut a new road, but to fraudulently increase his earnings he hewed coal from the sides of a road already finished, which, of course, was much easier work. In doing so he undermined some props and was killed. Because he had been guilty of serious and wilful misconduct, which as a defence is not available in case of death, the arbitrator found the employers liable. With this the Court of Appeal did not agree. "In this case the county court judge seemed to think it was enough to entitle the applicant to compensation if serious and wilful misconduct on the part of a workman was proved. This view would really strike out the words 'arising out of and in the course of the employment' from the earlier part of the section. But if the evidence is that the workman was doing something outside the scope of his employment, the proof of serious and wilful misconduct does not bring the accident within the scope of the employment," *per* **Cozens-Hardy, M.R.** See also under *Arising out of and in the course of the employment*, sub-heading *Causal Relation*.

SECT. 1 (3). If any question.

(3) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

IF ANY QUESTION.

What agreement must an employer accede to if he wants to avoid "any question"?

Form 24 provides for awards in ordinary cases. After ordering payment it runs, *such weekly payments to commence as from the day of and to continue during the total or partial incapacity of the said A.B. for work, or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Act.* In the first place, is an arbitrator entitled to make such an award at all, Form 24 notwithstanding? In the second, if he is, is a workman entitled to demand an agreement to the same effect? Experience shows that it is worth a good deal to him to be able to do so, as it enables him to get full compensation for considerable periods to which he is not entitled. So experience proves that it is much easier for him to get an arbitrator to continue an old award than to make a new one. In theory there should be no difference. In practice there is all the difference in the world. Many a man would probably fail to get any award at all if he had to prove he was still partially incapacitated, whilst an employer only usually ventures a review when he is practically certain the man is most decidedly better, if not wholly recovered. On the other hand there is the possibility that if an employer were enabled to suddenly end his payments he might simply starve the man into an unfair settlement. What then are the strict rights. If an employer refuses to give the man all he is entitled to, there is clearly some question outstanding to be settled by arbitration. Then the question is—not what Form 24 but—what the Act gives a man, for if an employer offers to give all the Act gives, clearly no question remains for determination. His liability is found in sect. 1 (1), read with Schedule I., par. (1) (i.) (b) of the Act. Regarding material words we find,—where *total or partial* incapacity results, an employer shall be liable to pay compensation which shall be a weekly payment during the incapacity not exceeding so much. What is meant by *the* incapacity? The point was contested in *Higgins* v. *William Poulsom* in the Court of Appeal,

SECT. 1 (3). If any question.

but was not decided, the case going off on a side issue. Mr. Bodell, who argued the case for the workman, and to whom I am indebted for particulars of what took place, tells me the Court seems to have been divided, and that whilst **Fletcher Moulton, L.J.**, was of opinion *the incapacity* related back to the *total or partial incapacity* referred to, **Cozens-Hardy, M.R.**, and **Farwell, L.J.**, were of opinion it was limited to the particular incapacity with which alone the agreement dealt. However, no judgments were given, and the point must be still regarded as open. Personally, to express an opinion, it would seem that for an employer to make an agreement beyond cavil, it should be to pay a given amount during total incapacity, and thereafter, during partial incapacity, such amount as might from time to time be agreed, or, failing agreement, as might be determined by arbitration.

This would seem to be more in accord with the provisions of the Act than Form 24 as now settled, and would work more justly. As regards onus of proof, this is not really a very serious matter, anyway in theory. No employer would think of ending or diminishing payments unless he had some evidence of the man's improvement, and evidence once given, the question of onus should cease to be material (see hereon Schedule II. (4), *Onus of proof*). So any offer of a lessened payment would be made at the risk of having to pay costs if on arbitration the judge should find the amount too small.

Thus it would seem that some such agreement as above would be reasonably fair to both parties.

IF NOT SETTLED BY AGREEMENT.

SECT. 1 (3). Not settled by agreement.

In *Fox* v. *Battersea Borough Council*, 4 B. 261, a workman met with an accident. Acting on the advice of his solicitor, he agreed with his employers to take 10*s.* a week as compensation. There was no doubt the advice was sound, as the employers had several defences, amongst others, want of notice, want of claim within six months, and, possibly, the Public Authorities Protection Act. But as the man was earning from 27*s.* 6*d.* a week to 30*s.*, on the agreement coming before the registrar for him to record, he found

SECT. 1 (3). Any question not settled by agreement.

that it was not genuine, and refused to do so. On appeal to the judge, he agreed with the registrar and also found it was not genuine, "since the employers, in order to get recorded an agreement for payment of less than half wages, purported to admit a liability which they really denied." This was in November, 1910, and in January, 1911, the judge as arbitrator made an award of compensation. On appeal, the preliminary objection was taken: it was out of time because it had not been entered within twenty-one days of the first date. As to this the Court held the whole formed part of the same proceeding, and then heard and allowed the appeal on the merits. There was no doubt about there being an agreement, and the only question for the registrar was, was it genuine? It was neither his business nor that of the judge to concern himself with the amount. "His function was limited to this one simple question: Is this a genuine agreement or not? Both parties admit the signature of Fox and the seal by the council, and there is no suggestion of fraud or duress or any attempt to set aside the agreement," *per* **Cozens-Hardy, M.R.**; and as **Buckley, L.J.**, in agreeing, cynically put it: "It seems to me that the registrar and the learned judge were seeking to exercise a sort of parental or paternal jurisdiction which does not exist." So **Kennedy, L.J.**: "The registrar in this case with no doubt the very best intentions went beyond anything the Act justifies in going into matters apart from genuineness."

SECT. 1 (4). When action dismissed.

(4) If, within the time herein-after in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, had been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

SECT. 1 (4). **Alternative Remedy when Action Dismissed.**

When action dismissed.

The right given by this sub-section is one personal to the plaintiff alone in such action. Thus in the case of death where a dependant brings an action, fails in it, and then asks for and gets compensation under this provision, his action does not enure for the benefit of other co-dependants not parties to the action. If they have failed to give notice or make their claim in time they must stand or fall on their own particular rights (*Kyle* v. *M'Gintys*, 48 S. L. R. 474).

SECT. 1 (5).

(5) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines, factories, or workshops, or the application of any such fine.

SECTION 2.

Time for Taking Proceedings.

SECT. 2. Time for taking proceedings.

2.—(1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

Provided always that—

(*a*) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

(*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

(2) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which the accident happened, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same at, or sending it by post in a registered letter addressed to, the residence or place of business of the person on whom it is to be served.

(4) Where the employer is a body of persons, corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to, the employer at the office, or if there be more than one office any one of the offices of such body.

NOTICE.

SECT. 2. Notice.

Whilst slight evidence may satisfy an arbitrator that a workman never means to give up a genuine claim, and has taken

SECT. 2. Notice.

steps to make it good, on the other hand very strong evidence should be given to satisfy him that a notice—which might defeat the claim and prove it fraudulent—should be dispensed with. Thus a cab-driver alleged slipping off his cab and spraining his foot on July 12th. He saw his employer the same evening but said nothing of the accident to him. He went into the hospital next day and said he sent notice by a woman who called to see him. On July 23rd he was discharged, and saw his employer to draw some wages, but again said nothing about the accident. On August 6th he alleged he sent notice by registered post, followed on August 12th by formal notice from his solicitor, which was the only notice the employer admitted receiving. On these facts the arbitrator found he had been prejudiced, and disallowed the claim. On the hearing it was contended that as the employer had not had the man examined by a doctor until October 17th he could not say he was prejudiced by anything happening after August 12th, and further that there was no case recorded where a notice having been given within a month had been held too late. In supporting the finding of the arbitrator, **Cozens-Hardy, M.R.**, said: "The judge has found that not giving the notice until August 12th was not giving notice as soon as practicable, and that in consequence the employer was prejudiced. I cannot myself see that any delay on the part of the employer after August 12th has anything to do with the matter. It is the period before that which has to be considered" (*Leach* v. *Hickson*, 4 B. 153).

In *Burrell* v. *Holloway Bros.*, 4 B. 239, the arbitrator found that though notice had not been given as soon as practicable the employers had not been prejudiced. On appeal, the Court held there was no evidence on which he could find they had not been prejudiced. The man, a carpenter, alleged he was working in the bathroom of a house, that he slipped on a piece of wood and sprained his ankle. It was alleged he sent verbal notice to the foreman carpenter, but it was held he was not the right person to whom to give it. The only other notice he gave was two months after the accident, and directly the employers received it they said

they must make inquiries, with the result they did so and resisted the claim. The man had referred to a mate being with him when he hurt himself, but he could not be found when the notice was given, and had he been found it would have been very different then asking him what had occurred to asking him the same question two or three days after the accident. Therefore the Court found the man had not discharged the onus on him of proving the employers had not been prejudiced. As regards such prejudice, Farwell, L.J., in *Eaton* v. *Evans*, stated the rule very clearly: "No specific evidence of 'no prejudice' is required; it is an inference to be drawn from the whole facts of the case."

In the Michaelmas term a still greater number of cases involving notice came before the Court of Appeal, but they turned so much on their own particular facts that they did not add anything of importance to what has already been stated. In *Hoare* v. *Arding and Hobbs*, not yet reported, a case arising out of the Clapham Junction fire, a girl in the next shop had such a shock through it that it ultimately resulted in a nervous breakdown. She delayed giving notice, expecting to get over it, and it was held she had a reasonable cause for so doing. A similar decision was given in *Fry* v. *The Mayor of Cheltenham*, W. N., 1911, 199, where the delay was also considerable, but where the arbitrator was satisfied the results of the accident did not become apparent for some considerable time. In *Stevens* v. *Insoles*, W. N., 1911, 205, it was held notice in fact had been given. Here a colliery company had put up a printed notice requiring every employee who had been injured to give notice to the manager, under-manager, or foreman before leaving for home, and stating that otherwise his claim would be disputed. A boy, slightly injured by the fall of a piece of coal, went with his father to give notice as directed, and this done, it was then entered in a book kept by the employers for the purpose. At the hearing objection was taken no notice had been served on the company and they had been prejudiced. But the Court of Appeal held the notice as given met every requirement of the Act, for as regards the only outstanding objection that actual

SECT. 2. Notice.

service had never been made, that was a requirement they were not prepared to give adherence to.

CLAIM.

SECT. 2. Claim.

A claim, though it need not be formal, must yet be a definite claim. In *Johnson* v. *Wootton*, 27 T. L. R. 487, a man was hurt when exercising a horse. He made no claim under the Act, but began an action which was dismissed for want of prosecution. What he should have done was on the dismissal to have asked for compensation to have been assessed under sect. 1 (4). Instead he began *de novo* a claim for compensation. Without deciding whether he had made an election to proceed by action or not, the Court held there was no evidence he had made any claim. For five weeks he had received wages, his wife fetching them. Then they were stopped, and the wife asked his employer would he compensate her and her children, to which, she said, he replied "that she was nothing to him or he to her." This was not a claim which could be held to have been a claim by the man himself. In *Roles* v. *Pascall*, [1911] 1 K. B. 982, it was held that ignorance of the existence of the Act was not a mistake or other reasonable cause for not making a claim. "In my opinion we should be in fact really repealing the period of limitation, namely, six months, which is distinctly imposed by the Act, if we were to say that any person could escape from and bring his claim any time afterwards if he could prove that he had never heard of the existence of the Act or did not know anything about its contents," *per* **Cozens-Hardy, M.R.**

As regards notice of claim in the case of industrial diseases, see under Section 8.

SECTION 3.

Contracting Out.

3.—(1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act. SECT 3. Contracting out.

(2) The Registrar may give a certificate to expire at the end of a limited period of not less than five years, and may from time to time renew with or without modifications such a certificate to expire at the end of the period for which it is renewed.

(3) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling a workman to withdraw from the scheme.

(4) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the benefits conferred by any scheme no longer conform to the conditions stated in sub-section (1) of this section, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the Registrar shall examine into the complaint, and, if satisfied that good cause exist for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall, after due provision has been made to discharge the liabilities already accrued, be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall

SECT. 3. Contracting out.

be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the Registrar under this Act.

(8) The Chief Registrar of Friendly Societies may make regulations for the purpose of carrying this section into effect.

By *Horn* v. *The Lords Commissioners of the Admiralty*, [1911] 1 K. B. 24, it was decided that when a valid scheme was made under this section it must be substituted for the provisions of the Act in its entirety. It is under this section that contracting out of the Act is provided for, and therefore when a workman comes within the scheme he is placed outside the provisions of the Act altogether.

SECTION 4.

Sub-Contracting.

SECT. 4. Sub-contracting.

4.—(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him ; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed :

Provided that, where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and he alone shall be liable under this Act to pay compensation to any workman employed by him on such work.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section, and all questions as to the right to and amount of any such indemnity shall in default of agreement be settled by arbitration under this Act.

(3) Nothing in this section shall be construed as preventing a workman recovering compensation under this Act from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

SECTION 5.

Provision as to Cases of Bankruptcy of Employer.

SECT. 5.
Provision as to cases of bankruptcy of employer.

5.—(1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation.

51 & 52 Vict. c. 62. 52 & 53 Vict. c. 60.

(3) There shall be included among the debts which under section one of the Preferential Payments in Bankruptcy Act, 1888, and section four of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, are in the distribution of the property of a bankrupt and in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount, not exceeding in any individual case one hundred pounds, due in respect of any compensation the liability wherefor accrued before the date of the receiving order or the commencement of the winding up, and those Acts and the Preferential Payments in Bankruptcy Amendment Act, 1897, shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the First Schedule to this Act.

60 & 61 Vict. c. 19.

50 & 51 Vict. c. 43.

(4) In the case of the winding up of a company within the meaning of the Stannaries Act, 1887, such an amount as aforesaid, if the compensation is payable to a miner or the dependants of a miner, shall have the like priority as is conferred on wages of miners by section nine of that Act, and that section shall have effect accordingly.

(5) The provisions of this section with respect to preferences and priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid.

(6) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

SECT. 5. Provision as to cases of bankruptcy of employer.

In *Homer* v. *Gough*, L. T., Nov. 4th, 1911, a workman was in receipt of compensation when his employer sold his business to a limited company, which took over and indemnified him against all claims. After a time a receiver for debenture-holders was appointed and a voluntary winding-up, not within sub-sect. 6, was decided upon. The man applied under sub-sect. 3 to the county court judge to commute his weekly payment. This the judge did at 100*l.*, and made an award that the receiver and liquidator should pay him the same. From this award the latter appealed to the Court of Appeal, who held it was not an appeal under the Act and did not lie to their Court. Ordinarily the procedure indicated would apparently seem to be that on a winding-up a workman should apply to the tribunal dealing with the assets of the company to be allowed to prove for the compensation at its assessed amount, and that to the extent of 100*l.* it should be declared a preferential claim. It is doubtful if the arbitrator as arbitrator has any jurisdiction under this section at all. Under the Act he has found a workman is entitled to a weekly payment. Default is made in payment, and execution becomes impossible because an order is made for winding up. Then the sub-section provides how such payment is to be treated on the winding-up.

SECT. 5 (3). Preferential claim.

SECTION 6.

Remedies both Against Employer and Stranger.

SECT. 6. Remedies both against employer and stranger.

6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and

(2) If the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act.

NOT ENTITLED TO RECOVER BOTH DAMAGES AND COMPENSATION.

SECT. 6 (1). No double remedy.

In *Huckle* v. *London County Council*, 4 B. 113, a workman was injured by third parties. He saw his employers, and asked them if they could do anything for him as he was destitute. They said yes, allowed him half wages, and gave him a receipt to sign which he neither read nor appreciated. In was to this effect: "Received under the Workmen's Compensation Act, 1906, . . . 12*s.* 8*d.*, compensation at the rate of one half my average weekly earnings up to . . . in respect of an accident which occurred to me on or about April 17, 1909." The arbitrator held he had *recovered* compensation within this section, and would not let the case go to the jury. The Divisional Court, affirmed by the Court of Appeal, held it was a question for the jury whether the man understood the nature and effect of the receipt, and sent the case back for re-trial. It does not appear their decision is intended to unsettle the law. It simply decides that the receipt was not conclusive against the man, and that all the circumstances had

to be gone into to find whether there had or had not been an effective exercise of an option. A long string of cases establishes that a man is not to try and get money from two people for the same accident. If he takes money from his employer, reserving his rights against others, he will fail. If he receives money from one party not to proceed against him he can proceed against no one else. But there may be cases where an employer may wish to help his men, destitute as this man was, without prejudicing their rights to get full damages from the wrongdoer. Then care must be taken how the weekly payments are made and received, or there may be grave risk of this being the result. Nor to protect himself is it necessary to explicitly state the payments are under the Act, for if in the end the man should claim compensation all such payments will have to be taken into account. Having regard to the ultimate development of this case, the man seems to have suffered from the extreme caution of his employers, as it was to his interest to get damages and not compensation, and there was no good reason why he should have given up his rights, nor why they should have wished him to do so.

SECT. 6 (1). **No double remedy.**

Employer's Right to Indemnity.

In *Lankester* v. *Miller, Hetherington* (*third party*), 4 B. 80, a man was sitting on the shafts of a cart when the horse, frightened by a motor driven by the third party, bolted, threw him to the ground, and killed him. His employer admitted liability, and claimed indemnity over. His right to such indemnity turned on this: Could his man have recovered from the third party for negligence? As regards actual driving, no fault could be found, as Hetherington had slowed down to about six miles an hour when overtaking the cart and horse, and the negligence alleged against him was that the hooter, which by statute he was required to carry, was defective. On this point, **Cozens-Hardy, M.R.**, held: "It may very well be—we have not to decide that here—that the third party may have been liable to a penalty for what he did, but the judge has found that the breach of the regulation was not

SECT. 6 (2). **Right to indemnity.**

SECT. 6 (2). Right to indemnity.

the *causa causans* of the accident. . . . I see no reason to differ from the learned judge." And, the other judges concurring, the third party was held not liable.

When Third Parties Fellow Workmen.

SECT. 6 (2). Fellow workmen third parties.

Lees and Sykes (*third parties*) v. *Dunkerley Bros.*, [1911] A. C. 5, is a most important case. Here a boy, Gibson, was injured by the negligence of the third parties, his fellow workmen. His employer admitted his right to compensation, and sought an indemnity from the third parties. By consent the arbitrator decided the question, and found for the employers. His decision was approved by the Court of Appeal, and again approved by the House of Lords. The third parties argued that as fellow servants they should be immune. **Lord Loreburn, L.C.**, said: "I can hardly imagine a more dangerous or mischievous principle than that which is sought to be set up here. It may be right or wrong to say, as *Priestley* v. *Fowler*, 3 M. & W. 1; 7 L. J. Ex. 42, says, that a man is not to be responsible for the negligence of his agents. That is decided law and I make no comment upon it. But it is a very different proposition to say that a man is not to be responsible for his own negligence. That would mean a free hand to everybody to neglect his duty towards his fellow servant and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty. Every one must have an interest in maintaining the law in a sense hostile to such a proposition, and I should think that of all classes in the community workmen who work together in many dangerous employments have the greatest interest of all in preventing the doctrine which has been very carefully and reasonably put forward from being accepted."

SECTION 7.

Application of Act to Seamen.

SECT. 7. Application of Act to seamen.

7.—(1) This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel in which the owner, or (if there is more than one owner) the managing owner or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications :—

(*a*) The notice of accident and the claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident :

(*b*) In the case of the death of the master, seaman, or apprentice, the claim for compensation shall be made within six months after news of the death has been received by the claimant :

(*c*) Where an injured master, seaman, or apprentice is discharged or left behind in a British possession or in a foreign country, depositions respecting the circumstances and nature of the injury may be taken by any judge or magistrate in the British possession, and by any British consular officer in the foreign country, and if so taken shall be transmitted by the person by whom they are taken to the Board of Trade, and such depositions or certified copies thereof shall in any proceedings for enforcing the claim be admissible in evidence as provided by sections six hundred and ninety-one and six hundred and ninety-five of the Merchant Shipping Act, 1894, and those sections shall apply accordingly : 57 & 58 Vict. c. 60.

(*d*) In the case of the death of a master, seaman, or apprentice, leaving no dependants, no compensation shall be payable, if the owner of the ship is under the Merchant Shipping Act, 1894, liable to pay the expenses of burial :

(*e*) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice :

(*f*) Any sum payable by way of compensation by the owner of a ship under this Act shall be paid in full notwithstanding anything in section five hundred and three of

SECT. 7. Application of Act to seamen.

the Merchant Shipping Act, 1894 (which relates to the limitation of a shipowner's liability in certain cases of loss of life, injury, or damage), but the limitation on the owner's liability imposed by that section shall apply to the amount recoverable by way of indemnity under the section of this Act relating to remedies both against employer and stranger, as if the indemnity were damages for loss of life or personal injury:

(*g*) Subsections (2) and (3) of section one hundred and seventy-four of the Merchant Shipping Act, 1894 (which relates to the recovery of wages of seamen lost with their ship), shall apply as respects proceedings for the recovery of compensation by dependants of masters, seamen, and apprentices lost with their ship as they apply with respect to proceedings for the recovery of wages due to seamen and apprentices; and proceedings for the recovery of compensation shall in such a case be maintainable if the claim is made within eighteen months of the date at which the ship is deemed to have been lost with all hands.

(2) This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.

(3) This section shall extend to pilots to whom Part X. of the Merchant Shipping Act, 1894, applies, as if a pilot when employed on any such ship as aforesaid were a seaman and a member of the crew.

REGISTERED IN THE UNITED KINGDOM.

SECT. 7 (1). Claim against non-British ship.

In *Panagotis* v. "*Pontiac*" (*Owners of*), Sol. Jo., Nov. 18, 1911, a colonial sailor, on a colonial ship, belonging to a colonial owner, was injured locally (in the Barry Dock, Cardiff), within the jurisdiction of the Act. He detained the ship, and this was an appeal against the order to detain. As this sect. 7, as well as sect. 11, which provides for the detention of ships, has nothing whatever to do with any ships except those specified, viz., those registered in the United Kingdom or British-owned as stated, the arbitrator had no power under the Act to order the detention. Therefore, as the Act did not apply, what he did was not under it, and therefore an appeal from his decision should have been made to a Divisional Court and not to the Court of Appeal.

As regards the rights of the seaman, he had none under these sections, and when he tried to enforce his claim as an ordinary

workman working within the jurisdiction of the Act he failed. He had not complied, nor could he comply, with the formalities requisite for so claiming, nor could he eke them out by what he had done under sects. 7 and 11. In substance, a sailor belonging to another nationality does not acquire any rights against his employer, under an Act which does not apply to him, merely because he happens to be injured on British soil.

SECT. 7 (1). Claim against non-British ship.

THE WEEKLY PAYMENT SHALL NOT BE PAYABLE.

An important decision on sub-sect. (*e*) is *McDermott* v. *S.S.* "*Tintoretto*," [1911] A. C. 35, in the House of Lords.

SECT. 7 (1) (e).

Paragraph 3 of Schedule I. of the Act reads: "*In fixing the amount of the weekly payment regard shall be had to any payment, allowance or benefit which the workman may receive from the employers during the period of his incapacity.*"

On these two clauses the employers built up a very ingenious argument. By virtue of the first clause they contended that so long as they were defraying the expenses of the seaman as mentioned they were not to be liable for any weekly payment under the Act, and by virtue of the latter clause that when such weekly payment was being assessed deductions had to be made for these selfsame expenses defrayed by them. A divided Court of Appeal, **Kennedy, L.J.**, *dissentient*, found for the employers, whilst a united House of Lords thought their contention far too technical, and were of opinion the two periods were to be regarded as continuous and not overlapping, *or*, putting the proposition the reverse way, they held that all that was intended was that the seaman was not to be paid twice over by the overlapping of benefits derived from two separate statutes.

SECT. 7 (1) (e). Overlapping payments.

See also under Schedule I. (3).

SECTION 8.

Application of Act to Industrial Diseases.

SECT. 8 (1). Application of Act to industrial diseases. 1 Edw. 7, c. 22.

8.—(1) Where—

(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed; or

(ii.) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease; or

(iii.) the death of a workman is caused by any such disease;

and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

(*a*) The disablement or suspension shall be treated as the happening of the accident;

(*b*) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable;

(*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due:

SECT. 8. Industrial diseases.

Provided that—

(i.) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation; and

(ii.) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment

of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable; and

(iii.) if the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation;

(*d*) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable;

(*e*) The employer to whom notice of the death, disablement, or suspension is to be given shall be the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the workman has voluntarily left his employment;

(*f*) If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final.

(2) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary.

(3) The Secretary of State may make rules regulating the duties and fees of certifying and other surgeons (including dentists) under this section.

(4) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that—

(*a*) Where the medical referee allows an appeal against a

SECT. 8. Industrial diseases.

refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine :

(*b*) Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

(5) In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under this section, and this section shall be construed accordingly.

(6) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order.

(7) Where, after inquiry held on the application of any employers or workmen engaged in any industry to which this section applies, it appears that a mutual trade insurance company or society for insuring against the risks under this section has been established for the industry, and that a majority of the employers engaged in that industry are insured against such risks in the company or society and that the company or society consents, the Secretary of State may, by Provisional Order, require all employers in that industry to insure in the company or society upon such terms and under such conditions and subject to such exceptions as may be set forth in the Order. Where such a company or society has been established, but is confined to employers in any particular locality or of any particular class, the Secretary of State may for the purposes of this provision treat the industry, as carried on by employers in that locality or of that class, as a separate industry.

(8) A Provisional Order made under this section shall be of no force whatever unless and until it is confirmed by Parliament, and if, while the Bill confirming any such Order is pending in either House of Parliament, a petition is presented against the Order, the Bill may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of Private Bills, and any Act confirming any Provisional Order under this section may be repealed, altered, or amended by a Provisional Order made and confirmed in like manner.

(9) Any expenses incurred by the Secretary of State in respect of any such Order, Provisional Order, or confirming Bill shall be defrayed out of moneys provided by Parliament.

(10) Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which

this section does not apply, if the disease is a personal injury by accident within the meaning of this Act.

SECT. 8. Industrial diseases.

This sect. 8 provides for industrial diseases generally. Subject to its provisions the ordinary practice prevails so far as applicable. Thus notice must be given and claim made as is usual under the Act. At the same time the very nature of the disease which is to be presumed an accident may necessitate some differentiation. Thus, as regards an ordinary accident, it can and must be fixed as a definite event at a definite time. The happening of the accident in the case of a disease under this section is purely hypothetical and is fixed as follows:—By sub-sect. 1 (iii.) (*a*), *the disablement or suspension shall be treated as the happening of the accident;* whilst sub-sect. 4 states the date of the disablement is to be such as is certified by the certifying surgeon, or if he is unable to so certify, the date when the certificate is given. Under these provisions it may well happen a date may be fixed as the date of the disablement or of the accident six months or more prior to the visit to the surgeon. In fact this did happen in the case of *Moore* v. *Naval Colliery*, not yet reported. Here a miner suffered from nystagmus, an affection of the eye caused by working in the pits. As a rule it is much benefited by plenty of sunlight. Hence, when a strike prevented his working, he thought it would get all right, and paid little attention to it. In the end he had to go to the certifying surgeon, and the strike having lasted over six months, the surgeon fixed the date of disablement prior to its commencement. Under these circumstances the Court of Appeal held the man had a most reasonable excuse for neither giving notice nor making a claim within the six months. So had it been necessary, which it was not, they would have undoubtedly held that an applicant was not bound by such artificial date, for the very scheme of the section suggests the possibility of not merely six months, but twelve months, elapsing before the disease fully develops itself. At the same time nothing was said which would warrant a man unnecessarily delaying a visit to the certifying surgeon. So it cannot be repeated too often, it is the

SECT. 8 (1) (iii.) (a). Disablement as accident.

SECT. 8 (1) (iii.) (a). Disablement as accident.

duty of a man making a claim to act reasonably and, as far as possible, promptly, and in every way to facilitate his employer checking the *bona fides* of his claim. If he has done this he can usually face the Court of Appeal and House of Lords with every confidence.

SECTION 9.

Application to Workmen in Employment of Crown.

SECT. 9. Application to workmen in employment of Crown.

9.—(1) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this Act would apply if the employer were a private person:

Provided that in the case of a person employed in the private service of the Crown, the head of that department of the Royal Household in which he was employed at the time of the accident shall be deemed to be his employer.

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame schemes with a view to their being certified by the Registrar of Friendly Societies under this Act.

50 & 51 Vict. c. 67.

Concurrent Contracts.

SECT. 9 (1). Concurrent contracts.

In the case of *Brandy* v. *S.S.* "*Raphael*," [1911] 1 K. B. 376, a stoker on a merchant vessel was a member of the Naval Reserve, and received 6*l.* a year as a retainer. He met with an accident and claimed that the 6*l.* should be taken into account as earnings under a concurrent contract of service under Schedule I. (2) (b). The arbitrator found in the man's favour, as also the Court of Appeal and the House of Lords. They were of opinion that the only effect of this section is that the Act is not to apply as between the Crown and those in its naval or military service, but that in no way was it intended to modify the relation under this Act between such persons and their ordinary employers. . . . So they thought the retainer was a typical case of a payment under a concurrent contract. The fact that the Crown might not be liable in certain cases did not, therefore, mean no other employer should be.

SECTION 10.

Appointment and Remuneration of Medical Referees and Arbitrators.

SECT. 10. Appointment and remuneration of medical referees and arbitrators.

10.—(1) The Secretary of State may appoint such legally qualified medical practitioners to be medical referees for the purposes of this Act as he may, with the sanction of the Treasury, determine, and the remuneration of, and other expenses incurred by, medical referees under this Act shall, subject to regulations made by the Treasury, be paid out of moneys provided by Parliament.

Where a medical referee has been employed as a medical practitioner in connection with any case by or on behalf of an employer or workman or by any insurers interested, he shall not act as medical referee in that case.

(2) The remuneration of an arbitrator appointed by a judge of county courts under the Second Schedule to this Act shall be paid out of moneys provided by Parliament in accordance with regulations made by the Treasury.

SECTION 11.

Detention of Ships.

SECT. 11. Detention of ships.

11.—(1) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this Act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge of any court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

(2) In any legal proceeding to recover such compensation, the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding.

(3) Section six hundred and ninety-two of the Merchant Shipping Act, 1894, shall apply to the detention of a ship under this Act as it applies to the detention of a ship under that Act, and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected.

SECT. 11. Detention of ships. 57 & 58 Vict. c. 60.

In *Panagotis* v. "*Pontiac*" (*Owners of*), Weekly Notes, 1911, 221, a county court judge made an order for the detention of a ship under this section. It not being a British ship, in accordance with the provisions of Schedule II. (4), the owners appealed against the order to the Court of Appeal. **Cozens-Hardy, M.R.**, and **Fletcher Moulton, L.J.**, held that the order for detention is only in aid of the arbitration, and is not part of it, and that therefore the appeal should have been to a Divisional Court. **Farwell, L.J.**, took the view that the words expressly added to the 1906 Act *or where he gives any decision or makes any order under this Act* are wide enough to cover orders made under that power. Then he added: "Any other construction would cause suitors unnecessary trouble and expense. In a case where the words are at least ambiguous, I think these considerations ought to have weight, and I am of opinion accordingly that the appeal is rightly presented to this Court." It is difficult to follow the reasons given by the **M.R.** if he is at all correctly reported, but stated slightly differently the case seems clearer. Here was, as we have said under Section 7, a colonial sailor on a colonial ship, belonging to a colonial owner, injured within the jurisdiction of the Act. But as neither Section 7 nor Section 11 have anything whatever to do with such ships or owners, the Act in no way applies to such a case, and what was done was in no way done under it. Notwithstanding this, for the reasons given by **Farwell, L.J.**, the Court of Appeal might well have heard the case, as in the event of either party being dissatisfied with the decision of the Divisional Court it would have to come before them again.

SECTION 12.

Returns as to Compensation.

SECT. 12. Returns as to compensation.

12.—(1) Every employer in any industry to which the Secretary of State may direct that this section shall apply shall, on or before such day in every year as the Secretary of State may direct, send to the Secretary of State a correct return specifying the number of injuries in respect of which compensation has been paid by him under this Act during the previous year, and the amount of such compensation, together with such other particulars as to the compensation as the Secretary of State may direct, and in default of complying with this section shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds.

(2) Any regulations made by the Secretary of State containing such directions as aforesaid shall be laid before both Houses of Parliament as soon as may be after they are made.

SECTION 13.

Definitions.

SECT. 13. Definitions.

13. In this Act, unless the context otherwise requires,—

"Employer" includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person;

"Workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing;

Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable; SECT. 13. Definitions.

"Dependants" means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively;

"Member of a family" means wife or husband, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, granddaughter, step-son, step-daughter, brother, sister, half-brother, half-sister;

"Ship," "vessel," "seaman," and "port" have the same meanings as in the Merchant Shipping Act, 1894;

"Manager," in relation to a ship, means the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner;

"Police force" means a police force to which the Police Act, 1890, or the Police (Scotland) Act, 1890, applies, the City of London Police Force, the Royal Irish Constabulary, and the Dublin Metropolitan Police Force; 53 & 54 Vict. c. 45. 53 & 54 Vict. c. 67.

"Outworker" means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the materials or articles;

The exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this Act, be treated as the trade or business of the authority;

"County court," "judge of the county court," "registrar of the county court," "plaintiff," and "rules of court," as respects Scotland, mean respectively sheriff court, sheriff, sheriff clerk, pursuer and act of sederunt.

"WORKMAN."

Limit of £250 a Year.

In this definition it will be seen the word used is *remuneration*. In the Schedule the word used is earnings. Is remuneration a SECT. 13. Definitions.

SECT. 13. "Workman" —£250 limit.

word of narrower or more comprehensive signification or is it to be regarded as synonymous with it? In Schedule I., par. 2 (*a*), the words are obviously used interchangeably, and are therefore to be regarded as synonymous. Therefore, in the case of a ship steward, the Court held that in his remuneration must be included not only his actual salary but the profits he made by the sale of whiskey and the extra wages he received when voyages were satisfactorily completed (*Skailes* v. *Blue Anchor Line*, [1911] 1 K. B. 360). In this they followed *Penn* v. *Spiers and Pond*, [1908] 1 K. B. 766, where it was held that tips received by a waiter in a railway restaurant car had to be included in his earnings, and that it was for the arbitrator to estimate their amount as well as he could, and *Dothie* v. *Macandrew*, [1908] 1 K. B. 803, where the same rule had been applied to board and lodging.

In *Knott* v. *Tingle Jacobs*, 4 B. 55, the rule as to tips was extended still further so as to include tips which a carman received from his employer's customers for services specially rendered them and entirely outside his contract with his master. *See further* under Schedule. I. (2) (*a*) under sub-heading *Average weekly earnings.*

"Contract of Service."

SECT. 13. "Workman" —Contract of service.

"*Workman*," with the exception specified, means any person who has entered into a contract of service with an employer as stated.

The contract of service is such a contract as establishes the relation of master and servant, and is distinguished from a contract for services, say, as between a solicitor and his client. In *Hughes* v. *Postlethwaite*, 4 B. 105, the arbitrator found such contract of service wanting. Here a vessel was sailed under the sharing system. The captain had authority to trade between any ports he pleased, the owner having no control in this matter. The owner took one half the gross receipts after deducting the first charges, etc., and the captain the remainder, out of which he paid the crew's wages. On these facts the arbitrator found

the owner and captain co-adventurers, and the Court of Appeal held there was evidence on which he could so find. SECT. 13. "Workman" —Contract of service.

The question of whether the relation was that of master and servant or bailor and bailee came up in a case where a taxi-cab driver wanted to recover compensation from its owners, who lent it out to him on hire. Both sides produced evidence in their own favour, and the arbitrator found for the owners, and it was held that there was evidence on which he could legally do so. The relation between the parties was in no way affected by the fact that as regards third parties the driver was by Act of Parliament to be deemed the servant of the proprietor. In fact, if any argument were to be drawn from this fact at all it would be in favour of the owner. For if the driver were the servant of the owner no Act would have been needed, and if he were not, the Act would only put him in the position of a servant so far and no further than it expressly stated (*Bates-Smith* v. *General Motor Co.*, 4 B. 249).

Contract of Service. Employment found from Philanthropic Motives.

It will be remembered that the Act is limited to workmen, and apart from the fact that it is not to include any person whose employment is of a casual nature, "workman" is to mean by this definition any person who has entered into or works under a contract of service . . . with an employer, etc. The meaning of "workman" has already been involved in several cases where employment has been found from philanthropic motives, and has again come under discussion in the case of *MacGillivray* v. *The Northern Counties Institute for the Blind*, 4 B. 429, which is a charitable institution to promote the temporal and spiritual well-being of blind persons residing in the northern counties. MacGillivray had been a pauper, but on the institution receiving him as an inmate the authorities paid it 4*s.* a week for his maintenance and 4*l.* a year extra for his clothing. In addition it received 20*l.* a year from a Donald Fraser Bequest Fund on account of this man. The institute SECT. 13. "Workman" —Contract of service.

SECT. 13. "Workman" —Contract of service. Philanthropic institution.

gave the man board and lodging and 5*s.* a month, and on a year's working were a few pounds out of pocket on his account. The man was injured and sought compensation. For him it was argued that the contract between the parties was one of service and that the essentials of a contract of service, freedom of contract, payment and power of selection and dismissal were present in his case.

For the institution it was argued the relationship was based on charity and not on that of master and servant. The institute did not carry on a trade or business in the sense of the statute, and the injured man was not a workman earning wages. His status was that of an inmate of a charitable institution, in which he had to perform certain duties and was given certain privileges, in part provided by the benevolence of other people. The arbitrator found for the institution, but the Sessions Court reversed his decision. They found the man was employed under a contract of service. "He was not bound to go to the institute, and the institute was not bound to receive him. He stipulated that he would give his services for what they were worth, and they in return stipulated they would give him board, lodging, clothing, and 5*s.* a month in money": Provided—which the Court did not add—they received on his account from outside charitable sources 34*l.* 8*s.*, in addition to his services.

This seems a most doubtful conclusion. The contract of service referred to is that contract which establishes the relationship of master and servant in the popular sense and usually where there is a mutual interchange of advantages of an approximately equal value. Here such bargain was entirely wanting. Outsiders paid the institution 34*l.* 8*s.* to keep the man, and even then he was a loss to them. What were his earnings? Was there to be included in his earnings board and lodging for which third parties had to find the money? Of course he could go if he chose, equally he could be sent away. So could a pensioner given a house rent free and paid 5*s.* a month for keeping the garden tidy. But such are not the only or conclusive tests of a contract of service, and here the

relationship was one founded on charity and charity alone, and the institution would no more have thought of employing him in a pure way of business than they would have expected to make a profit out of him had they done so.

SECT. 13. "Workman"—Contract of service.

"WORKMAN" IN CASE OF DEATH TO INCLUDE DEPENDANTS, ETC.

Rights not Derivative.

In a series of cases it has been decided that a dependant's right to compensation is not a derivative right but one independent of the rights of the injured workman. In *Howell* v. *Bradford*, 4 B. 203, a settlement made under the Employers' Liability Act, 1880, between an employer and his workman was set aside as not *bonâ fide* at the instance of the dependants (*see also* under Section 1 (2) (*b*)), and in *Jobson* v. *Cory*, 4 B. 284, where an arbitrator had actually ended compensation on the ground the man had recovered, it was yet held that the dependants were not bound by such finding, but were entitled to have it decided as a fact whether the man had or had not died from the accident. As between them and the employers the matter was not *res judicata* that the man had recovered.

SECT. 13. "Workman" to include dependants—Right not derivative.

"DEPENDANTS."

Dependency a Question of Fact.

To fully appreciate *Keeling* v. *New Monckton Collieries*, [1911] 1 K. B. 250, which deals with the right to compensation of wives separated from their husbands, one must have regard to the earlier decisions. At first there was a disposition to interpret the Act with a wide philanthropy which is not quite so general at present. Thus, to give a woman 300*l.* instead of 250*l.*, a sympathetic Court found her dependent on her husband and not on a son who contributed to her support (*Senior* v. *Fountains*, [1907] 2 K. B. 563). This view of the law suited to a nicety the employers in the next case. Here a mother wanted to recover for a son she had lost who had contributed to her support. The Court, bound by their previous

SECT. 13. "Dependants"—Question of fact.

SECT 13. "Dependants"—Question of fact.

decision, had to hold that as she was dependent on her husband in law she could not be dependent on her son in fact (*M'Clean* v. *Moss Bay Iron Co.*, [1909] 2 K. B. 521). But employers were not long to enjoy this immunity, and it was but a few short weeks before a unanimous House of Lords held dependency was a question of fact, and on this basis gave judgment for a woman who in one terrible disaster had lost both husband and sons (*Hodgson* v. *West Stanley Colliery Owners*, [1910] A. C. 229). But once more in this case of *Keeling* the Court of Appeal have held dependency is in law and have given a woman compensation when for twenty-two years she had been separated from her husband and during the whole of the time had never received a penny from earnings upon which she was deemed to have been dependent. In giving judgment **Cozens-Hardy, M.R.**, distinguished this case from *Hodgson's Case* on the ground that the only point decided by the House of Lords in that case was that a woman who was dependent in fact and law on her husband could also be dependent in fact on her two sons as well. The presumption of dependency in law which had been laid down in a long series of cases in the Court of Appeal was not affected by the decision of the point involved, and as regards the judgments, so far as they dealt with more than such point, they were simply *obiter*, very instructive no doubt, but in no way material. Certainly it seems a grave injustice and doubtful law that an employer should be made responsible for a wife to whom a husband has never given a penny, for twenty-two years, and who had never been made to. But the point remains open and can now only be settled by an authoritative decision in the House of Lords.

This has now been done and the decision of the Court of Appeal has been again reversed. Dependency is a question of fact and is not to be founded on a presumption of law.

How far Question of Fact affected by Presumption of Law.

With this decision we might conclude, the law was now simple and settled. But this is far from being the case. To entirely ignore the legal presumption is to

SECT. 13. "Dependants"—Question of fact.

err as much on one side of the line as to found dependency on it is to err on the other. Where is the line to be drawn. In *Keeling's Case* the facts were so obviously over the line that no nice discrimination was needed, but it is equally clear that the Lords did not lay down the rule that the legal presumption is not to be considered at all. How far must it be considered? First, what are the exact words to be construed. "*Dependants*" *means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death*, etc.

Here, in the first place, it would be well to observe one or two trifling words. The first of these is the word "*were*." It is not "are" or "will be," but at the time of the death actually *were* dependent, and dependent upon what? the legal liability? the obligations of the husband? the right to be maintained, etc.? No! but upon the earnings of the husband. Here, again, note the dependency is upon, not the husband, but the earnings of the husband. Here then we have, as the Lords say, a simple question of fact. At the time of the death was the dependant dependent upon the actual earnings of the deceased. We are not entitled to speculate what would happen or might happen in the future; the only facts to be considered are those existing at the time of death. At some subsequent date the wife might enforce her rights and become in fact actually dependent on the money she then recovered, but this is a possibility that is not to be taken into account. We are limited to the time of death. Then how can the presumption of law help her if in fact she is at such time receiving nothing. One certain way suggests itself. A woman may be deserted, and at the time of the death may be actively prosecuting her right to maintenance, and then, as **Lord Loreburn, L.C.**, concisely puts it: "The fact that a legal duty lay upon the workman to provide maintenance is an element to be considered, no doubt, because people usually count upon getting what they are entitled to get." Therefore if an arbitrator was of opinion that a woman was enforcing her claim and there was a

SECT. 13. "Dependants"—Question of fact.

reasonable prospect of her doing so with success, he might well find that so far she was dependent on her husband's earnings, and she would not be less dependent because she had to collect them by legal process. Then, to go another step, suppose at the time of death she had taken no active step to enforce her rights, but clearly had not the slightest intention of abandoning them. What the result would be in such a case would clearly depend on the actual findings of fact by the arbitrator. If the man was in receipt of earnings and the wife by virtue of her status was in all reasonable probability likely to actually benefit by those very earnings, he could well find she was dependent on them. Can he go further? It is difficult to see how. So the same considerations apply when a wife is compelled to leave her husband by his conduct. When, however, a husband and wife part for their mutual benefit, say, or when he goes to find work, more difficult questions arise. Apart from legal presumption, it might well be held that a good husband who had always supported his wife would continue to do so. Then if at the time of his death he had got work but had not actually sent money to her, it might well be inferred he would have done so as soon as he could. But suppose for some time he had only been receiving just enough to keep himself. Grant his will to help his wife to the utmost—still it would be a travesty of language to find her dependent on earnings of which she had never received a penny, and as regards the possibility they ought to be greater in the future this could not be taken into consideration.

Dependency of Child also Question of Fact.

In two recent cases the Court of Appeal have given full weight to the decision of the Lords in *Keeling's Case.* In *Lee* v. "*Bessie*" (*Owners of*), W. N., 1911, 222, a seaman was drowned, leaving a wife and two children. They had been married in 1898, and lived together until 1903, when she left him and took their children with her, and went to live with a man named

Gold, who supported them, and by whom she had three illegitimate children; and in *Polled* v. *Great Northern Railway*, not yet reported, where a wife more or less rightly refused to live with her husband, and left him and lived apart with their one little girl. In both these cases the rights of the wife were held governed by the decision, but as regards the children, more difficult questions remained to be disposed of, viz., whether in fact they were dependent upon their father. The decision of the Lords in *Keeling's Case* now brings the law of England into line with that of Scotland, which has never recognised the theory of dependency in law further than the right it gave of being reduced to dependency in fact. This was the view taken in *Briggs* v. *Mitchell*, 48 S. L. R. 606, where an illegitimate child had been handed over to the care of a Mrs. R., who practically entirely provided for it. On the death of its mother it was sought to make the employers responsible for compensation, but it was held it was not dependent on its mother, and that they were not liable.

SECT. 13. "Dependants"—Question of fact.

"MEMBER OF A FAMILY."

In *McDougall* v. *McDougall*, [1911] S. C. 26, a son worked with his father exactly as for any outside employer, and paid him so much a week for lodging with him. It was still held he was not a workman within the Act.

SECT 13. Definitions.

SECTION 14.

Special Provisions as to Scotland.

SECT. 14. Special provisions as to Scotland. 43 & 44 Vict. c. 42.

14. In Scotland, where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the sheriff court and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the Second Schedule to this Act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this Act shall apply.

SECTION 15.

Provisions as to Existing Contracts and Schemes.

SECT. 15 (1). Provisions as to existing contracts and schemes. 60 & 61 Vict. c. 37.

15.—(1) Any contract (other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of that Act) existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

(2) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act.

(3) The Registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes.

(4) If any such scheme has not been so re-certified before the expiration of six months from the commencement of this Act the certificate thereof shall be revoked.

SECTION 16.

Commencement and Repeal.

16.—(1) This Act shall come into operation on the first day of July nineteen hundred and seven, but, except so far as it relates to references to medical referees, and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this Act. SECT. 16 (1). Commencement and repeal.

(2) The Workmen's Compensation Acts, 1897 and 1900, are hereby repealed, but shall continue to apply to cases where the accident happened before the commencement of this Act, except to the extent to which this Act applies to those cases. 60 & 61 Vict. c. 37. 63 & 64 Vict. c. 22.

SECTION 17.

Short Title.

17. This Act may be cited as the Workmen's Compensation Act, 1906. SECT. 17. Short title.

SCHEDULES.

FIRST SCHEDULE.

Scale and Conditions of Compensation.

SCHED. I. (1) (1) The amount of compensation under this Act shall be—

(*a*) where death results from the injury—

(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer;

(ii.) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants; and

(iii.) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;

(*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound:

Provided that—

(*a*) if the incapacity lasts less than two weeks no compensation shall be payable in respect of the first week; and

(*b*) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings

are less than twenty shillings, one hundred per cent. shall be substituted for fifty per cent. of his average weekly earnings, but the weekly payment shall in no case exceed ten shillings. SCHED. I. (1).

DEATH RESULTS.

Assessment of Compensation.

Tamworth Colliery Co. v. *Hall*, 4 B. 313, A. C., deals with an extremely difficult and important point, the assessment of the compensation payable to partial dependants. SCHED. I. (1) (a) (ii.). Assessment of compensation —Partial dependants.

The amount payable to those wholly dependent is definitely fixed, and is not in the discretion of the arbitrator; that payable to partial dependants has to be a sum *reasonable and proportionate to the injury to the said dependants*. In assessing such compensation a not unusual custom has been to inquire what the actual benefit or allowance received has been, to reduce it to a weekly average, and then to multiply that weekly average by 156. This is done by analogy to the direction for obtaining the amount in the case of total dependency. The first case to break into this fairly general practice was that of *Osmond* v. *Campbell and Harrison*, [1905] 2 K. B. 852. Here a widow, earning 1*s.* 11*d.* a week by laundry work, lost her husband by an accident. Wholly dependent she would have been entitled to 156*l.* As, however, she was only partially dependent, the employer claimed she was only entitled to the capital value of the amount of actual benefit she received, which would be a pound a week less the expense of her husband's keep. The arbitrator, however, awarded her 150*l.*, and the Court of Appeal held he had not misdirected himself in so doing. He had given effect to the fact of partial dependency by deducting the odd pounds. It does not seem that any rule of law or presumption of law is to be deduced from this case. It was simply a question of fact, Had the arbitrator given a sum reasonable and proportionate to the injury? and the Court held he had. This case has been followed by others, with the result that in many instances the compensation has been assessed on the basis of total dependency with a sum deducted on account of the independent income. But in the case of the *Tamworth Colliery Co.*

SCHED. I. (1) (a) (ii.). Assessment of compensation —Partial dependants.

the Court of Appeal were inclined to press *Osmond* v. *Campbell* still further. Here a lad earned 6*s.* 11*d.* per week, which he paid to his father. Further, he helped him in his trade of a barber, which was worth another 6*s.* a week. The arbitrator found the father was not dependent on such earnings of his boy, as it cost him more than 6*s.* 11*d.* to maintain him, and the value of his services could not be taken into account. If they were earnings, then *pro tanto* as a member of the family he was not a workman within the Act. The Court of Appeal (**Farwell, L.J.**, dissenting) held the case was governed by *Osmond* v. *Campbell*, and that the cost of maintenance ought not to have been deducted. This made it unnecessary to inquire into the nature of the boy's service. It is by no means clear that *Osmond's Case* is an authority for this proposition unless at the same time a due deduction be also made for the capital value of the independent income. Here, however, this would have more than swamped the amount receivable, and so it is best to regard *Osmond's Case* as simply holding that on its own particular facts the arbitrator directed himself correctly.

Farwell, L.J., practically agreed with the views of the arbitrator and said: "There are two questions to be determined in cases of this sort. First, is the claimant a dependant at all, and secondly, if so is he or she wholly or partly so dependent? Both are questions of fact. . . . There is no room for legal presumption at all. Lord Halsbury, in the case of *Main Colliery Co.* v. *Davies*, [1900] A. C. at p. 361, says, 'Now my Lords as to that question I do not think the legislature ever intended there should be any sharp definite line drawn, but that in each case the question must turn upon whether there is or is not what the legislature has described as a condition of dependency as being the test whether or not a person is entitled to any compensation by reason of death.' I understand the House to have decided in the latter case, that a father whose child does in fact contribute money to the common fund out of which the family is maintained may be dependent on the earnings of such child, not that he must be so. I cannot think that a father who receives his boy's

SCHED. I. (1) (a) (ii.). Assessment of compensation —Partial dependants.

wages of, say, 3*s.* a week, and expends 6*s.* a week on keeping him, can, without doing violence to the English language, be said to be dependent on the earnings of such boy. In truth the boy depends on the father, although partially only, not the father on the boy." So far the House of Lords accepted both the conclusions and arguments of the learned judge. But in dealing with the value of his services at home they took a somewhat different view, conceding that in themselves they could not be reckoned as part of the earnings, yet if the boy gave his father services, such services might be set against his maintenance, and so leave free his other earnings to increase the family fund. "There is," said the **Lord Chancellor**, "no rule of law that I know of to prevent the county court judge from looking at the whole of the facts; there is no rule of law to say that he must so marshal the receipts and outgoings as to set off the whole of the maintenance against the earnings, and so to negative the fact of the dependency." The point was apparently originated by **Lord Robson**, who well said, "Surely the value of the boy's assistance to his father in the business ought to be taken into account, not as earnings but as lessening the actual cost of the boy to his father." On these lines the case was remitted to the county court for the arbitrator to assess the compensation payable as a question of fact, with directions he was to have regard to what the boy paid the father, what the value of his services were, and how much his keep cost.

Does this overrule *Osmond's Case* and say the arbitrator there found incorrectly in not having deducted the expenses of the husband's keep, or is it simply a case of other facts, other considerations? The arbitrator has simply to award a sum reasonable and proportionate to the injury. That is the law and all the law. If he thinks there is practically no difference between a widow earning 1*s.* 11*d.* a week in a laundry and a widow earning nothing, and thinks she ought to have as much as if she were totally dependent, can he be said to have misdirected himself if he admits such considerations weighed with him. The truth is, every method now in use for assessing such compensation

SCHED. I (1) (a) (ii.). **Assessment of compensation —Partial dependants.**

pressed to its logical limit may prove absurd in working. Suppose a mother receives 10*s.* a week from a son earning 2*l.* a week. Then in case of his death, if wholly dependent, she would receive 300*l.* But suppose she was earning 1*s.* 11*d.* in a laundry, is it not ridiculous to even suggest she should receive so little as 10*s.* × 156, or less than 80*l.* And this amount would be the same whether she were earning 1*s.* 11*d.* or 11*s.* 1*d.* Equally absurd is it to say that a mother who has never received more than 2*s.* 6*d.* a week from a son, and is never likely to, is entitled to receive the full 300*l.*, less merely the capital value of her independent income, which if 1*s.* 11*d.* a week might be again assessed at only 6*l.* To arrive at an amount reasonable and proportionate to the injury the arbitrator must have regard to all the facts, and no sounder reason for an award seems to have been given than that by **Judge Parry** in *Turner* v. *Miller*, 3 B. 305, when awarding 125*l.*, arrived at by no particular method: "I considered that the son had been a substantial contributor to the family for many years, and would have continued to be so had he lived, and assessed the money to be paid on that basis." Here, then, he took into consideration the further fact—in practice the most material of all—the likelihood of the allowance being continued. In this he seems clearly justified. Of course this likelihood must be based on the facts as existing at the time of the death and would be independent of anything which subsequently happened, *e.g.*, the death of the mother soon after her son, who, had he survived, would undoubtedly have made no further payments to those claiming through her.

"WHERE . . . PARTIAL INCAPACITY RESULTS."

Weekly Payment.

SCHED. I. (1) (b).

The average weekly earnings prior to the accident is fixed once and for all, and is an invariable amount. The wages subsequently earned may naturally vary. To give effect to this, and to save the parties coming before him for continual re-adjustment of the amount, the arbitrator in *Newhouse* v. *Johnson*, not yet reported, fixed the weekly payment at two-thirds of the difference

between 1*l.* and what the man actually earned in any given week, with a minimum of 10*s.* per week. However convenient and simple this award, it infringed one of the cardinal principles of the Act that an arbitrator cannot dive into futurity, but must decide every case on evidence actually before him. Hence he must fix a definite amount even if it has to be varied from time to time on a change of circumstances taking place.

SCHED. I. (1) (b). Partial incapacity—Weekly payment.

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(2) For the purposes of the provisions of this schedule relating to "earnings" and "average weekly earnings" of a workman, the following rules shall be observed:—

SCHED. I. (2).

(*a*) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district;

(*b*) where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident;

(*c*) employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause;

(*d*) where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings.

AVERAGE WEEKLY EARNINGS.—Tips and Extras.

The question of how far tips and extras were to be included

SCHED. I. (2) (a).

SCHED. I. (2) (a). Average weekly earnings—Tips and Extras.

in remuneration, so as to make a man's earnings exceed 250*l.*, was involved in *Skailes* v. *Blue Anchor Line*, [1911] 1 K. B. 360. For a discussion of this, see *ante*, under Section 13, sub-heading *Workman*.

Knott v. *Tingle Jacobs*, 4 B. 55, has also been there referred to showing what further tips are to be considered as earnings. Here a carman received tips from his employer's customers for services specially rendered them, but outside his contract with his master. As a matter of theory—possibly practice as well—the knowledge that such tips were receivable clearly made the engagement that much more valuable, and without them the presumption would be the wages would have had to be so much higher.

Concurrent Contracts.

SCHED. I. (2) (b). Average weekly earnings—Concurrent contracts.

How far a reservist's pay in the Navy could be treated as received under a current contract was lengthily discussed in *Brandy* v. *S.S.* "*Raphael*," [1911] 1 K. B. 376; for which *see* under Section 9.

Grade of Employment.

SCHED I. (2) (e). Average weekly earnings—Grade of employment.

The question of grade was involved in the Scotch case of *Babcock and Wilcox* v. *Young*, [1911] S. C. 406, where a man who had worked as boilermaker and then became a labourer was held to be only entitled to compensation on the basis of his earnings as a labourer.

SCHED. I. (3).

(3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper.

REGARD SHALL BE HAD.—Overlapping Benefits under M. S. A.

SCHED. I. (3). Regard shall be had.

In *Kempson* v. "*Moss Rose*" (*Owners of*), 4 B. 101, an injured

SCHED. I. (3). Regard shall be had—Overlapping benefits.

seaman, on March 9, was taken to the hospital and kept there until June 16. Under the erroneous idea his employers were liable under the Merchant Shipping Act, 1894, the captain promised they would be responsible for his expenses there. After some correspondence with the hospital authorities the employers, in settlement of their claim for 18*l.* 8*s.*, paid them 9*l.* 8*s.* 9*d.*, which was the full amount of compensation due to the man from the date of his accident until he left the hospital.

The man then claimed compensation for the same period, and the arbitrator found that, as the payments had been made without his knowledge or concurrence, regard should not be had to such payments in assessing the compensation due. On the other hand, the Court of Appeal thought it one of the clearest cases ever brought before them, and that it should. The very end of the clause was to enable an employer to help his injured servant without running any risk of his sympathetic action rendering him liable to pay double compensation. The argument for the seaman had been advanced that it was not right that employers should be able to pay away without his consent all or more than his compensation, possibly only ostensibly for his benefit. To this the reply was that such payments were not necessarily to be deducted, but only that the arbitrator must have regard to the fact that the workman has received a benefit from his employer during the course of his incapacity.

McDermott v. "*Tintoretto*," [1911] A. C. 35, was also a case arising out of an accident to a seaman.

By sect. 7 (1) (*e*) it is enacted :—*The weekly payment shall not be payable in respect of the period during which the owner of the ship is under the Merchant Shipping Act*, 1894, *as amended*, etc., *liable to defray the expense of maintenance of the injured master, seaman or apprentice.* Under this section the owners claimed they were not liable to pay compensation for such period, and then claimed that regard should be had for all the payments they had made on the seaman's behalf during the self-same period. The only amazing fact is that it required the House of Lords to decide that all that was intended was that the

SCHED. I. (3). seaman should not receive overlapping benefits. *See also* under sect. 7 (1) (*e*).

THE WEEKLY PAYMENTS SHALL IN NO CASE EXCEED.

SCHED. I. (3). On this point an excellent judgment was given by his Honor Judge Lumley Smith. A man who had been earning 32*s*. 6*d*. a week lost his hand, and got light employment at 25*s*. a week. He claimed as compensation the difference, 7*s*. 6*d*. The arbitrator awarded 3*s*. 9*d*., saying, "The Act says that regard is to be had to the difference between what he has now and what he had before. I think the idea of the Act is that half the loss should be awarded him. As long as he was earning nothing he got half 32*s*. 6*d*. I do not think it an absolute rule, but the common sense of it is that, having got 25*s*., now he can have half the difference . . . and I shall award 3*s*. 9*d*. I think the intention of the Act is that each party should sustain a certain amount of monetary loss." The Court of Appeal held he had not bound himself by any rule of law, but had correctly exercised his discretion, and approved what he had done (*Humphreys* v. *City of London Electric Lighting Co.*, 4 B. 275).

Circumstances at Time of Review to be Considered.

SCHED. I. (3). Weekly payments—How estimated on review.

Here, however, we must note the further most important decision given in *Bevan* v. *Energlyn Collieries*, W. N., 1911, 206, as to the assessment of this weekly payment on review, or where there has been a change in the circumstances of the case. In the first place the datum line from which all subsequent variations are to be measured is the average weekly earnings as determined or agreed in the first instance. This is fixed and is a constant. The varying item, the amount actually being earned, has to be determined from time to time whenever review is demanded. In this case the arbitrator, having found these amounts, held himself bound to have regard to them alone, and to nothing else, and on such basis fixed the amount at half the difference between them. Thus originally the man had been earning 2*l*. 19*s*. 1*d*. a week, and at the time was only earning 1*l*. 16*s*.

SCHED. I. (3). Weekly payments—How estimated on review.

This resulted in a difference of 1*l.* 3*s.* 1*d.*, of which the arbitrator gave him 11*s.* 7*d.* as compensation. But it was shown that owing to the Eight Hours Act wages generally had considerably fallen, and that even if he had been in full work on full pay he could not have earned more than 2*l.* a week. That is, his total loss due to his incapacity was not more than 4*s.* a week. To, therefore, give him 11*s.* 7*d.* was to give him 7*s.* 7*d.* a week more than if he had never been injured. The question was, was the arbitrator right in having regard to no other matters than the two items what the man was then earning and what he had been earning? According to the reading of the old Act, as construed in *James* v. *Ocean Coal Co.*, [1904] 2 K. B. 213, he certainly was, but in the present Act a further qualification has been deliberately added. The amount is not to exceed such difference, and it *shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper.* These words in italics do not appear in the old Act, and we may take it they were inserted for the very purpose of modifying it. Therefore it follows that whilst an arbitrator is still bound by these two items in determining the difference, yet when he has to decide what proportion of that difference he has to give, say, 10, 20, 50, 70 per cent., or the whole of it, all the circumstances of the case are to be considered. And such circumstances obviously include a general fall of wages such as was shown to be the case in this instance, as well as the fact that his injuries were very slight. It was contended for the workman that under these words only matters personal to him were to be considered. **Farwell, L.J.**, was of the opinion they were more general in their effect, and "were added to give an arbitrator a freer hand to do what is just," and **Cozens-Hardy, M.R.**, said it was not competent for a judge to say he would not go into extraneous circumstances, but would only have regard to things personal. So, also, evidence was given of the average wages of nineteen other colliers in a similar position to that of the applicant, and was considered relevant to the inquiry. No doubt this decision will largely widen the scope of such inquiries, as well as their number, and if every variation

SCHED. 1. (3). Weekly payments—How estimated on review.

in the general rate of wages is to afford good grounds for seeking review, either on the part of the master or the part of the man, there must be an immense number of cases where some change must be required.

ABLE TO EARN

SCHED. I. (3).

This enactment is probably of the most general importance in the whole statute. Other points may be of moment in an occasional instance; this practically affects every case where a workman does not succumb to his injury.

The subject here presents itself under these two heads:—(*a*) Ability to earn as a physical fact, and the steps taken by the man to get well; and (*b*) the essentials of suitable employment.

Here first let us read shortly the different parts of the Act which have to be construed together to arrive at what is exactly enacted.

SCHED. I. (3). Able to earn.

Sect. 1 (1) states that where *personal injury by accident . . . is caused to a workman, his employer shall be liable to pay compensation in accordance with the First Schedule.*

The material words so referred to (Schedule I. (1) (*b*)) are, *where total or partial incapacity for work results, a weekly payment during the incapacity, not exceeding fifty per cent. of the average weekly earnings during the previous twelve months,* and then the words of this, par. (3), *in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident, and the average weekly amount which he is earning or is "able to earn in some suitable employment or business after the accident."*

Though many cases have been decided on these clauses during the past year there has been no departure from the principles already laid down. Dealing first with (*a*), ability to earn as a physical fact. This, as hitherto, offers few or no difficulties in law. Each case turns on a question of fact to be decided by its own evidence.

SCHED. I. (3). Able to earn—As a physical fact.

If a man has physically recovered, his incapacity has ceased; if

he has not physically recovered, he is entitled to receive compensation as specified.

SCHED. I. (3). Able to earn—As a physical fact.

How far a man can be said to have physically recovered has been discussed in several cases, and here we will first deal with some of the simpler ones. In *Emmerson* v. *Donkin*, 4 B. 74, an apprentice got his hand mutilated, but otherwise recovered, and the arbitrator made an order ending liability. Nor would he make a suspensory order, though there was no doubt the lad was permanently injured. His counsel tried to contend—not without reason—that where there was permanent injury, like mutilation, there was always a possibility of the man suffering from it at a future date, and that no order should be made ending liability. But the Court, having taken his point, held incapacity or no incapacity was a question of fact, and they could not interfere with the arbitrator's discretion. Having regard to a reading hitherto given to the Act, one might be inclined to think there was no evidence on which the arbitrator could find his incapacity was ended, and certainly, remembering the case of *Radcliffe* v. *Pacific Steam Navigation Co.*, [1910] 1 K. B. 685,[1] we think he had some reason to complain. It is not satisfactory that in one case the loss of a finger should be held to cause no incapacity, and in another be regarded as sufficiently serious to warrant a restoration of full compensation two years after the accident had taken place.

If an arbitrator in the case of mutilation is entitled to find the incapacity is ended, it is an *à fortiori* conclusion he is entitled to do so in less serious cases, as when a wrist was alleged to have been broken (*Reyners* v. *Makin*, 4 B. 267).

In *Burgess* v. *Jewell*, 4 B. 145, a man had his little finger crushed by an accident. Part was amputated, and but for slight adhesions got well. These the employers contended work would break down, and the arbitrator agreed with them and ended the compensation, because, as he found, the man unreasonably refused to try such cure. But the man proved that the hospital doctor advised him

[1] Here a ship's butcher had full compensation restored him two years after losing a finger, because he was able to prove that fact had so circumscribed his area of opportunity he could not get work.

SCHED. I. (3). Able to earn—As a physical fact.

that his best course was to have another piece of his finger cut off, which he had submitted to. On these facts the Court of Appeal held there was not a tittle of evidence the man had acted unreasonably. Their decision emphasises the old rule that in all such cases the one test is, has the man acted reasonably or has he not? If he has, that is the most that can be asked of him. The case of *Moss* v. *Akers*, 4 B. 294, is not so satisfactory. Here also a workman had injured his hand; his employers contended, and the medical referee agreed with them, that exercise would soon cure the incapacity. But on the advice of his own doctor, that it would do no good, the man had refused to so exercise it. The arbitrator found as a fact, and the Court of Appeal held there was evidence to justify him, that the man had not acted unreasonably. Apparently it would seem that as exercise would have done no harm and might have done some good, he should have tried, but probably other facts influenced the arbitrator which did not appear in the report. In *David* v. *Windsor Steam Coal Co.*, 4 B. 177, the arbitrator gave the salutary decision that a miner who had physically recovered could not claim compensation because, through idleness and loafing, he had let his muscles get so soft he could do no work.

A curious case is that of *Ball* v. *Hunt*, [1911] 1 K. B. 1048. By an accident some years previously, a miner lost the sight of one eye, but the eye itself was unaltered. By a subsequent accident the eye itself was again injured and had to be removed. His infirmity was thus made patent, and no one would employ him. The arbitrator found the incapacity was due to the loss of sight and not removal of the eye, and refused compensation. This case is on the line. Looking at the words of the Act and its schedule, we note compensation is only to be given where a man has suffered personal injury by accident, and where incapacity results from such injury, and unless the incapacity was due to the accident it is not within the Act. In such a case his personal appearance did not affect his capacity as a miner. In the case of a waitress, where a pleasant face is of no small importance, it certainly would be otherwise.

An intervening cause which of itself would cause incapacity does not necessarily operate to deprive a man of compensation who has previously been incapacitated by an accident. Thus a miner who injured his hand was for some years able to do light work which his employers found him. Then he had to give it up on account of heart disease. The fact he had done light work was no proof his incapacity due to the accident was ended, and as the burden was on his employers to show it was, which they were not able to do, they failed in establishing their case (*Cory Bros.* v. *Hughes*, 27 T. L. R. 498).

SCHED. I. (3). Able to earn—As a physical fact.

Cases of Neurasthenia.

Here we come to those cases where the only outstanding incapacity is due to neurasthenia. There have only been one or two more or less unimportant decisions on this point during the past twelve months. As regards these, once again reading shortly the material words of the Act together we have:—*Where personal injury by accident . . . is caused to a workman* compensation shall be payable . . . *where . . . partial incapacity results.*

SCHED. I. (3). Able to earn—Neurasthenia.

To set the Act in operation there must be (1) personal injury caused by accident, and (2) it must result in incapacity.

As regards the personal injury referred to the words are perfectly general. It may be physical, it may be mental, there is no reason it may not be moral. A man may have his nerves shattered as well as his muscles bruised or bones broken, and from an energetic industrious worker he may become an idle, worthless fellow. All these may be equally due to personal injury by accident, and when from all or any of these causes incapacity results, compensation becomes payable. The burden of proof of such incapacity is on the workman, and evidence of its discharge is usually found in the award given or in the registered memorandum of an agreement made between the parties.

The next stage is when the employer wishes to vary or end such award. Then the burden of proof is on him to show there has been a change of circumstances sufficient to warrant the order he seeks. And what has he to establish? Not unfrequently an

SCHED. I. (3). Able to earn—Neurasthenia.

employer thinks he has done his part when he shows that the man is no longer suffering from anything but neurasthenia. But this is not enough. As we have just mentioned, nervous breakdown may be as much the result of the accident as actual physical injuries, and may just as much result in incapacity. Hence where neurasthenia or other such effect is outstanding the employer must show, not merely that the man is suffering from neurasthenia, but that the neurasthenia is no longer due to the personal injury caused to the workman, but is due to some other cause. This is like the case we have already mentioned, where the arbitrator found that a miner's incapacity was not due to the accident but was due to the soft state of his muscles, due to his loafing. But cases where neurasthenia is involved are not so simple as this, especially when a man's *bona fides* is not questioned. A man may otherwise be wholly recovered and yet one of the results of the accident may be his genuine belief he is hopelessly incapacitated. So the condition may be aggravated by his refusing legitimate means of cure, not from obstinacy but from the innate conviction that it will do him harm. At this stage then it is only courting disaster for an employer to seek review. The man's incapacity is still clearly the result of the accident. What he must do is to determine what course of cure is most suitable, and then ask the workman to try it. If the workman refuses he is then in a position to go to the Court and ask for its assistance. To give the Court seisin as a matter of form he may have to ask for the amount payable to be varied or ended, but to avoid the risk of having to pay the costs of the day, he should either in the application or in a concurrent letter state that he is willing the hearing should be adjourned, and that he will continue to pay compensation if in the meantime the workman will take the steps suggested for getting better.

Of course it is the man's duty, quite apart from his employer's urging, to do his utmost to get well, but if the unfortunate result of the accident is to more or less make the man irresponsible, the employer must proceed by steps, for by striking too soon he may easily prejudice the best of cases. These remarks do not apply

to malingering, such cases are simply disposed of. The difficult ones are those where there has been a serious accident in the first place, and no suggestion of bad faith in the second. Then *festina lente* should be the employer's motto, combined with a never ceasing watchfulness to see that the workman is doing everything possible to get well again.

SCHED. I. (3). Able to earn—Neurasthenia.

Neurasthenia Due to Intervening Cause.

The case of *L. & N. W. R.* v. *Taylor*, 4 B. 11, affords a simple example of where the arbitrator found the neurasthenia was due to an intervening cause, and not to the accident. The man had been injured and apparently got well, for he returned to work. Then he ceased on the ground of a recurrence of pain and nervousness due, as he said, to his accident. But, as in the meantime he had suffered from influenza, the arbitrator found his state was due to this, and hence decided against him. In *Beech* v. *Bradford Corporation*, 4 B. 236, a man was unloading sets, and his evidence was, "I felt something like a tear in my back." The employers' doctors were by no means satisfied there had been an accident at all. Some cynics have said that the Workmen's Compensation Act has been the most perfect cure for lumbago ever discovered; as it is now unknown except as an aristocratic complaint. Apparently this was the view of the employers' doctor in this case. Following the accident the man got into a nervous condition which appears to have gradually got worse; but the arbitrator, accepting the employers'evidence, found as a fact that it was not due to the accident, and terminated the payment of compensation.

SCHED. I. (3). Able to earn—Neurasthenia intervening cause.

Suitable Employment.

The question of what is suitable employment becomes material when a man has sufficiently recovered to do some work but is unable to find the work he is fitted for. This may be due to two reasons: the state of the labour market, or the limited class of work which, owing to his accident, he can do, and of which there is none offering or obtainable.

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SCHED. I. (3). Able to earn—Suitable employment.

As to the first the law is well settled, the employer does not guarantee the labour market, and as to the second it is equally agreed that a circumscribed area of opportunity for disposing of one's labour may be as much due to a continuing incapacity caused by the accident as to the physical inability itself to do actual work. This is well put by **Kennedy, L.J.**, in *Dobby* v. *Pease*, 2 B. 370, when he says: "This is merely saying in other terms that he is incapacitated by the accident. If he would have got work but for the accident, but cannot otherwise, it is because of the accident."

But though this is so, though in law a master does not guarantee the labour market, hitherto in practice it has very nearly come to his having to do so. To get variation of an award he has had usually to prove that not only could a man do work, but that he could also get it. The fact is, to draw the line between not guaranteeing the labour market and having to show that a man's failure to get work is not due to his accident is in practice very difficult indeed.

The law is well reviewed in the case of *Cardiff Corporation* v. *Hall*, [1911] K. B. 1009, where **Fletcher Moulton, L.J.**, has made an admirable attempt to show the true principles governing such cases. Here the facts were simple. A man fell and was injured. His employers found him light work, and engaged him to drive a cart from which, in a second accident, he was thrown, his left arm being injured. This disabled him from doing such light work, or any work requiring the use of his left arm. The arbitrator accepted the report of the medical referee, and found he was "quite able to do any form of light work, more particularly such as would require principally the use of the right hand." On this he reduced the weekly payments from 9*s*. 2*d*. to 8*s*. a week. For doing so he gave his reasons as follows: "I was of opinion that the condition of the respondent had greatly improved since the making of the award which it was sought to review, and that there had consequently been such a change of circumstances as entitled me to review the weekly payments ordered by that award, and taking all the circumstances into consideration I came to the

conclusion that 8*s.* a week was a proper and sufficient weekly payment to be made to the respondent in respect of the incapacity from which he is suffering. With this view the Court of Appeal (**Cozens-Hardy, M.R.**, *dissentient*) agreed. In dissenting, the Master of the Rolls said: "The effect of the accident had not been removed, and I cannot think that the workman ought to have his compensation reduced merely on the ground he is physically able to do a different kind of work, which in truth cannot be proved. In *Clarke* v. *Gas Light and Coke Co.*, 21 T. L. R. 184, it was held that if a man unsuccessfully made reasonable efforts to obtain employment at work which he is physically capable of performing he must be regarded as not able to earn anything."

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Further, the learned judge cited with approval a portion of his judgment in *Proctor* v. *Robinson*, [1911] 1 K. B. 1004, as follows:—"Either the employers should first obtain some work which the workman could do and offer it to him and give evidence of this; or else they should give evidence there is some chance of the workman obtaining a particular kind of light work in the district. The burden was upon the employers, and they have failed to discharge it."

With this view the other members of the Court did not agree. The difficulty was how to give effect to the principle, a master does not guarantee the state of the labour market. It had never been laid down, and was going too far to require a master to show, not only that a man could do work, but that also he could get it. If for a minute, apart from this case, we consider the Act, this seems clearly to be so. For, going by steps, what has to be proved by each party respectively? The man must prove (*inter alia*) the accident, injury, and consequent incapacity, and this proved, and only when proved, is the arbitrator called upon to assess the compensation. The question of ability to earn does not arise until the man has proved so much. And he must always prove so much before he is even called upon to give any evidence at all as to the compensation he should receive. And whilst this is so at an original hearing there is little or no difference in the case of review, except that the original wages,

SCHED. I. (3). Able to earn—Suitable employment.

the original accident, and the original incapacity are all taken as proved and need not be proved again. Then if the employer wants any variation in the award he must prove a change of circumstances justifying it. When he has done this, then the arbitrator has practically a new case to deal with, and has once more to assess compensation *de novo* in exactly the same way as at the original hearing. The basis of his proceeding is as before, the wages, the accident, and the consequent incapacity, but the compensation formerly given has nothing whatever to do with the compensation again to be given. His award was for compensation during the incapacity as then proved. By proof of change of circumstances the employer has shown that *primâ facie* the amount originally given is no longer correct, and that it must be assessed anew. The arbitrator will act on all the evidence before him, but if there be no evidence of what the incapacity is, he has no evidence on which to make a new award. The old award has worked itself out. The incapacity on which it was based has gone. The state of the existing incapacity the man must show, and how far it lessens his earning powers. This shown, the duty of the arbitrator will be to give him a sum not exceeding 50 per cent. of his original wages, and in no case exceeding the difference between what he did earn and can earn. If the man has not entirely recovered, the employer will admit he may be entitled to some amount, but it is for the man to show what it should be. To all appearances he can do some work. Then he must show why he cannot get it or take the risk of the arbitrator thinking he does not want to do so. And, quoting **Fletcher Moulton, L.J.**, the chance of obtaining employment is in many cases so personal a matter that it can only be arrived at by evidence as to the results of the efforts to obtain it.

Change in Circumstances, Weekly Payments to be Reassessed.

It was argued in this case that an amount having once been fixed the burden lay on the employer applying for review, not only to prove a change of circumstances, but also to prove by how much the compensation already given should be in

consequence reduced. But this was not agreed to by the Court, who were of opinion that the arbitrator having been satisfied an improvement had taken place in the man's condition, it was for him to form an estimate of what the reduction in the payments should be. (See also under Par. 16 as to Review.)

SCHED. I. (3). Able to earn—Suitable employment.

Suitable Employment, Evidence as to.

And what evidence is to satisfy the arbitrator that the man though able to do work is still unable to get it and unable because of the accident? Every case must stand on its own facts. In this case the man proved he had sought work as a bill distributor, from the post office, etc., and had failed. This, though strong evidence, was yet held not conclusive evidence to bind the arbitrator to find he could not get work on account of his accident. And here **Fletcher Moulton, L.J.**, pointed out the distinction to be observed. An accident might be such that whilst preventing a man from doing his original work, yet might only result in relegating him to an inferior grade of work, but which work had its regular supply and demand. He instanced the possible case of a highly-gifted fitter, who, through his accident, might become incapable of anything more than ordinary work at less wages. The difference between the wages he formerly earned and could then only earn would form the basis of a weekly compensation, but the risk of getting such everyday work was a risk ordinary to every worker, and a risk which the employer did not take, as he did not guarantee the labour market. Thus in the case in question the man was rightly compensated for being reduced to a different grade of labour, but as he could do such labour like every one else in it, he had to take the risk of the market, and not his employer. If one of the incidents of such lower grade were that work in it was more intermittent or less certain than in his original employment, this would be one of the factors that would govern the arbitrator in fixing the original amount he should be paid as weekly compensation.

Cardiff Corporation v. Hall.

No doubt the extremely careful way in which **Fletcher Moulton, L.J.**, went into the matter was largely due to *Radcliffe's*

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Case, it being quite unthinkable that a man who has only lost a finger is thereby totally incapacitated from earning anything whatever. If a man were to be so injured as to become, as **Fletcher Moulton, L.J.**, aptly terms it, an odd lot, then his evidence he could not get work, if unrebutted by his employers, might go a very long way in justifying an arbitrator regarding him as still wholly incapacitated by his accident. But a man who has only lost one finger could never be regarded as such odd lot, not even if it totally incapacitated him in his original business. For here it must be noticed that there is not a word in the Act limiting a man's ability to earn to his own or any particular trade. The only qualification is, it must be a suitable employment.

Indirect Result of Accident.

This important case was followed in *Guest, Keen and Nettlefold* v. *Winsper*, 4 B. 289. Here a workman in a steel rolling mill had an eye injured. On review, on the evidence and on the report of the medical referee, the arbitrator found he was physically able to work, but that in the circumstances of his trade, as the accident would entail his wearing spectacles, he would not be able to obtain employment. He accordingly declined to vary the payments. On appeal it appeared that the case of the *Cardiff Corporation* v. *Hall* had not been brought to his notice, it not having been then reported, and it was remitted back to him to rehear on the ground there was a change of circumstances, and that the man should be able to earn something.

Where, however, a miner had hurt his knee, and though perfectly recovered except that at any time his knee might give way, and this prevented his getting work, as was proved by his having called on forty firms, it was held there was evidence that owing to his accident he was still wholly incapacitated. This seems clear. He had done what every man ought to do, had done his utmost to get work, and having failed, and failed because he had been injured, it was only just he should receive compensation (*Thomas* v. *Fairbairne*, 4 B. 195).

Offer of Work by Employer.

SCHED. I. (3). Able to earn—Suitable employment.

When an employer offers work he of course at once secures proof there is work the man can do. And when a man refused it because he thought it might prove too heavy, and, notwithstanding the employer's assurance, refused to attempt it, the Court held the arbitrator was amply justified in reducing his compensation to 1*d.* a week. The man took up the attitude, the offer was not clear, and there was no evidence on which the judge could reduce his payments. But it is evident he quite misconceived the position, for if otherwise physically improved it is for him to explain and satisfy an arbitrator why he cannot do something useful for his living (*McNamara* v. *Burtt*, 4 B. 151).

A similar fate befell a workman who never tried to get work. Again it was urged, and without success, that it was for the employers to prove that the man is able to get light work but refuses to go and try it (*Anglo-Australian Steam Navigation Co.* v. *Richards*, 4 B. 247).

The case of *Ward* v. *Miles*, 4 B. 182, was heard the same day as *Cardiff Corporation* v. *Hall*, but was decided before judgment in that case was given. Here a waitress injured her finger which made her clumsy. On her employer complaining she gave notice to leave and then claimed compensation. Her wages had been 10*s.* a week and tips equal to another 1*s.* a week. The arbitrator awarded her 5*s.* a week as partially incapacitated. The Court of Appeal held there was evidence on which he could so award.

Misconduct in Relation to Able to Earn.

SCHED. I. (3). Able to earn—Suitable employment—Misconduct.

Of course, a workman can bring about his dismissal by his misconduct, when his incapacity to earn will no longer be due to his accident but to such misconduct. But it is pressing this doctrine too far to say that because of one act of misconduct a man is to be generally disentitled. Of course, it is a question of fact for the arbitrator to decide, but in *White* v. *Harris*, 4 B. 39, following *Clarke* v. *Gas Light and Coke Co.*, 21 T. L. R. 184, the Court held he had gone too far when he did so end the

SCHED. I. (3). compensation. Here it appeared on cross-examination that the employer had only had to find fault with him on one or two occasions, and the further suggestion he had made trouble at the works did not seem to have been at all established.

SCHED. I. (4). Medical examination.

(4) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and, if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place.

See under Paragraph 14 of this Schedule.

SCHED. I. (5). On death—Payment into court.

(5) The payment in the case of death shall, unless otherwise ordered as hereinafter provided, be paid into the county court, and any sum so paid into court shall, subject to rules of court and the provisions of this schedule, be invested, applied, or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the persons entitled thereto under this Act, and the receipt of the registrar of the court shall be a sufficient discharge in respect of the amount paid in:

Provided that, if so agreed, the payment in case of death shall, if the workman leaves no dependants, be made to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due.

SCHED. I. (6). Transfer of money in court.

(6) Rules of court may provide for the transfer of money paid into court under this Act from one court to another, whether or not the court from which it is to be transferred is in the same part of the United Kingdom as the court to which it is to be transferred.

SCHED. I. (7). Legal disability—Payment into court.

(7) Where a weekly payment is payable under this Act to a person under any legal disability, a county court may, on application being made in accordance with rules of court, order that the weekly payment be paid during the disability into court, and the provisions of this schedule with respect to sums required by this schedule to be paid into court shall apply to sums paid into court in pursuance of any such order.

SCHED. I. (8). Rights of—dependants inter se.

(8) Any question as to who is a dependant shall, in default of agreement, be settled by arbitration under this Act, or, if not so settled before payment into court under this schedule, shall be settled by the county court, and the amount payable to each dependant shall be settled by arbitration under this Act, or, if not so settled before payment into court under this schedule, by the county court. Where there are both total and partial dependants nothing in this schedule shall be construed as preventing the

compensation being allotted partly to the total and partly to the partial dependants. SCHED. I. (8).

(9) Where, on application being made in accordance with rules of court, it appears to a county court that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of the various dependants, or for any other sufficient cause, an order of the court or an award as to the apportionment amongst the several dependants of any sum paid as compensation, or as to the manner in which any sum payable to any such dependant is to be invested, applied, or otherwise dealt with, ought to be varied, the court may make such order for the variation of the former order or the award, as in the circumstances of the case the court may think just. SCHED. I. (9). Variation of awards in case of widows.

(10) Any sum which under this schedule is ordered to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar. SCHED. I. (10). Investment.

(11) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings banks, and the declaration to be made by a depositor, shall not apply to such sums. SCHED. I. (11). Investment.

(12) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or, subject to regulations of the Treasury, by the judge or registrar of the county court. SCHED. I. (12). Money in court—Payment out.

(13) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank. SCHED. I. (13). As to duplicate accounts in savings bank.

(14) Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place. SCHED. I. (14). Medical examination.

Medical Examination.

The one rule as to a workman submitting himself to medical examination is that he shall act reasonably, and, beyond being SCHED. I. (4)—(14). Medical examination.

SCHED. I. (4)—(14). Medical examination.

illustrations, the decisions in one case are little authority for what must be decided in another. It has been held in some circumstances that a workman is entitled to have his own doctor present at his examination, *Devitt* v. "*Bainbridge*" (*Owners of*), [1909] 2 K. B. 802, and in others that he is not, *Morgan* v. *Dixon*, W. N., 1911, 220, and that an arbitrator cannot make it a condition for such examination that the employers pay the doctor's fees (*Osborne* v. *Vickers, Sons & Maxim*, [1900] 2 Q. B. 91). So there have been cases where he has been held right in insisting on being examined at his own doctor's surgery (*Harding* v. *R. M. S. P. Co.*, 4 B. 59), but not at the office of his solicitor (*Turner* v. *Bell*, 4 B. 63); and in *Warby* v. *Plaistowe*, 4 B. 67, where he made it a condition that he should be so examined in his solicitor's office or in his presence, he was held to have obstructed the examination. It must be noted in these cases the Court of Appeal supported the arbitrator's finding of fact, but it is by no means certain that in apparently similar cases the arbitrator would necessarily come to or have to come to the same conclusion. Suppose a man was injured in his eye. It is quite conceivable the arbitrator might consider it very unreasonable for him to put his employers to the expense of sending their own doctor to see him, and paying him large fees for going to a distance when there was nothing to prevent him visiting him at his own surgery. Both sides should do their best to facilitate the examination and have as much regard for the convenience of one another as the nature of the case makes possible.

The case of *Morgan* v. *Dixon* has been now taken to and confirmed by the House of Lords. **Lord Loreburn, L.C.**, said "that in every case it was a question of fact for the arbitrator to say whether or not the wish of the workman to have his medical man present was in the circumstances reasonable. Their Lordships, being a Court of law, were not judges of fact. In his opinion there was no such absolute right given to the workman, and, as it was that there were in this case no special circumstances to be considered, he moved that the appeal be dismissed with costs." **Lord Shaw** was of opinion that a man's

desire to have his own medical man present was reasonable, and on this ground differed from the rest of the Court. SCHED. I. (4) —14.

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(15) A workman shall not be required to submit himself for examination by a medical practitioner under paragraph (4) or paragraph (14) of this schedule otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations. SCHED. I. (15). Reference by mutual agreement.

Where a workman has so submitted himself for examination by a medical practitioner, or has been examined by a medical practitioner selected by himself, and the employer or the workman, as the case may be, has within six days after such examination furnished the other with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the registrar of a county court, on application being made to the court by both parties, may, on payment by the applicants of such fee not exceeding one pound as may be prescribed, refer the matter to a medical referee.

The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matter so certified.

Where no agreement can be come to between the employer and the workman as to whether or to what extent the incapacity of the workman is due to the accident, the provisions of this paragraph shall, subject to any regulations made by the Secretary of State, apply as if the question were a question as to the condition of the workman.

If a workman, on being required so to do, refuses to submit himself for examination by a medical referee to whom the matter has been so referred as aforesaid, or in any way obstructs the same, his right to compensation and to take or prosecute any proceeding under this Act in relation to compensation, or, in the case of a workman in receipt of a weekly payment, his right to that weekly payment, shall be suspended until such examination has taken place.

Rules of court may be made for prescribing the manner in which documents are to be furnished or served and applications made under this paragraph and the forms to be used for those purposes and, subject to the consent of the Treasury, as to the fee to be paid under this paragraph.

Reference by Mutual Agreement.

It will be observed that references under this paragraph can

SCHED. I. (15). Reference by mutual agreement.

only be made by joint request. It usually speaks well for the man's genuineness that he will unite in such joint request. But once such joint request, and a referee appointed and his report made, so far as it goes it is conclusive. In *Sapcote* v. *Hancox*, 4 B. 184, it was argued otherwise, but it seems the workman confused a reference under this paragraph with one under Sched. II. (15), which empowers an arbitrator, etc., to submit to a referee for report any matter which seems material to any question arising in the arbitration. This latter report when made is not binding, and the arbitrator can give as little or as much effect to it as he deems wise. The case of *Quinn* v. *Flynn*, 3 B. 594, on which his counsel relied, only deals with reference under this second schedule paragraph. It is an Irish case, but is in agreement with the law as settled by the English Courts. On a similar report under Sched. I. (15) the arbitrator terminated the compensation. This was the case of *Cranfield* v. *Ansell*, 4 B. 57. It was urged he had no power to make such award, as all matters had been settled by agreement between the parties, and that there was an agreement capable of being recorded. This was hardly a matter of substance. No doubt the man could have applied for registration of the agreement, and have left it to his employer to apply for a stay pending review, but on the other hand if he chose to apply *de novo* by a request for arbitration there was no objection, and the result must have been the same in either case.

SCHED. I. (16). Review.

(16) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act:

Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound.

The Recording of Stale Agreements.

Under the old Act the practice was to record any agreement,

whether stale or otherwise, though before issuing execution the registrar had to be satisfied there was default: **Rules 67 and 68.** This is modified by Sched. II. (9), proviso (b), but yet the convenient practice still seems fairly general to allow agreements to be registered, strictly according to their tenour, and then leave the parties to apply for modification by review. This course was adopted in *London and North Western Railway* v. *Taylor*, 4 B. 11 (also referred to under *Able to Earn*, sub-heading *Neurasthenia due to intervening cause*, Sched. II. (9) (b). SCHED. I. (16). Review.

Overpaid Compensation.

A most important point was decided in *Hosegood* v. *Wilson*, 4 B. 30. There is usually delay between the application for review and the decision. In the meantime the employer has to continue paying the full compensation. Then on review the arbitrator may end the higher amount and substitute a lower one as from the earlier date. But though the employer has thus overpaid compensation it has been decided in this case that by virtue of Sched. I. (19), which says compensation may not be charged, he cannot deduct such amount from subsequent payments on account of compensation. He has a right to recover it by action for whatever it is worth, but that is all. Probably the right course for the employer to adopt is on the review, when the arbitrator finds there is sufficient change of circumstances to warrant his fixing anew the weekly payment, to ask him, under Sched. I., par. (3), to have regard to the overpayments made between the application and the hearing as a payment, allowance, or benefit under that provision. Of course, what "regard" an arbitrator may have will be a matter entirely in his own discretion. SCHED. I. (16). Review.

Should Liability ever be Finally Terminated.

Not where injury is serious, like the loss of an eye (*Braithwaite* v. *Kirk*); but in the case of *L. & N. W. R.* v. *Taylor* it was further contended liability should never be ended, but that on recrudescence SCHED. I. (16). Review.

SCHED. I. (16). Review.

of incapacity due to the injury *ipso facto* a right to compensation should revive. (See further Sched. II. (9) under *Record of Agreement after Workman's Recovery.*)

SCHED. I. (17). Redemption of weekly payment.

(17) Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum.

REDEMPTION OF WEEKLY PAYMENT.

The meaning of this paragraph came up for consideration in the appeal and cross-appeal of the *Calico Printers' Association* v. *Higham*, W. N., 1911, 221. Here a workman had lost two fingers at his employment, and for a time had been paid full compensation, and then for the six months prior to the application had received 9*s.* 3*d.* a week for partial disablement. His employer then applied to compound. The arbitrator held he had no discretion as to amount and was bound to fix it actuarially, which he did at 312*l.* Had it been a matter within his discretion he would have thought 84*l.* enough. Further, whilst fixing the amount the employers could compound at, he made no order compelling them to compound. Against this part of the award there was the cross-appeal. Unfortunately the case had to be sent back to the arbitrator as he had omitted to find whether the incapacity was or was not permanent. The materiality of such finding will appear from the following consideration. Here we may repeat from our "Employers' Liability," p. 358, what we thought to be the effect of this paragraph, as it seems on the whole to fairly represent the position: "Its probable effect is (*a*) where

incapacity is permanent the employer can redeem his liability with a lump sum fixed at seventy-five per cent. of the value of an annuity as stated, and neither more nor less; and (*b*) *in any other case*, as where incapacity is not permanent, as may be settled by arbitration." It will thus be observed the whole method of assessment turns on the one all important fact, is the incapacity permanent or is it not?

SCHED. I. (17). Redemption of weekly payment.

This is the first finding of fact that an arbitrator in every case must definitely make.

Here it should be noted that permanence of injury and permanence of incapacity are by no means co-extensive. The incapacity referred to is incapacity for work, not physical, mental, or other incapacity. A lawyer may lose his finger and not be incapacitated for work at all. This distinction is most important. Whilst there are many cases where the injury is permanent, there are very few indeed where incapacity is likely to be so as well. If a man is totally paralyzed, seriously maimed, blinded of both eyes, one might well find he is permanently incapacitated, but failing such serious injury an arbitrator might equally well find that the incapacity is not permanent. As this leaves the whole matter in his discretion, and as there is nothing to prevent his giving the full amount as determined actuarially, he should himself assess it, unless the evidence is very conclusive there is likely to be no change in the man's earning power.

The next point to be observed is that the weekly payment to be compounded is the weekly payment that has been actually continued during the preceding six months and at the same amount. At the hearing there were several queries as to how payments to infants and nominal awards were to be treated. Was a man in receipt of a penny a week to be liable to have it compounded at its simple actuarial value. If such a contention is ever seriously pressed it will be equally met by the reply that whilst the paragraph provides for compounding the weekly payment, it does not say one word about ending the liability except *pro tanto*. If more is to be done, a distinct award under par. 16 as to review must be

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made, and no arbitrator would make this unless satisfied the amount was a fair one.

The next important question is, what effect is to be given to the word "may"?

It is to be observed this paragraph has been framed in the interests of the employer, and there seems no reason why an employer should not withdraw his application at any time prior to the actual award on the usual terms of payment of costs. In fact, it is rather hard on an employer—note, in no way in fault—that he should have to resort to such expensive machinery to ascertain what his liability can be compounded for. It will be noted the word "may" is a reference to the employer, and is not a discretion given to the arbitrator as to allowing or refusing an application to compound. To give effect to the word "may" the award might well be made in the form that the compensation should be redeemed on payment of *l.*, which would leave matters *in statu quo* until such payment was made.

The principles thus arrived at obviously show that such a procedure as that adopted by the arbitrator in *Victor Mills, Ltd.* v. *Shackleton*, W. N., 1911, 197, cannot possibly be correct. Here a workman had for some time been in receipt of 16*s.* 1*d.* a week as compensation for total and permanent incapacity. The total thus received amounted to 179*l.* 6*s.* 7*d.* The employer then applied to redeem. The arbitrator found he would have given 300*l.* originally, and from this he deducted the above amount and awarded the balance, viz., 120*l.* 13*s.* 5*d.* If the finding of total and permanent incapacity be correctly reported, the amount should have been 75 per cent. of the value of a Post Office annuity of 16*s.* 1*d.* a week, nor would the amount so given be in the discretion of the arbitrator.

SCHED. I. (18). Workman leaving United Kingdom.

(18) If a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment, unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature. If the medical referee so certifies, the workman shall be entitled to receive quarterly the amount of the weekly

payments accruing due during the preceding quarter so long as he proves, in such manner and at such intervals as may be prescribed by rules of court, his identity and the continuance of the incapacity in respect of which the weekly payment is payable. SCHED. I. (18).

(19) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same. SCHED. I. (19). Compensation not to be charged.

Overpayment of Compensation.

In *Hosegood* v. *Wilson*, [1911] 1 K. B. 30, a workman had been overpaid compensation. Although his employer could recover this amount by action, or, at least, get judgment for it—not quite the same thing—yet he could not treat such overpayments as payments on account of future weekly payments, and to stop payments of compensation until the balance was wiped off was decided to be wrong. See also under Sched. I. (16).

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(20) Where under this schedule a right to compensation is suspended no compensation shall be payable in respect of the period of suspension. SCHED. I. (20). Suspension of compensation.

(21) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subsection of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme. SCHED. I. (21). Certified schemes. 59 & 60 Vict. c. 25.

(22) In the application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act. SCHED. I. (22). Application to Ireland. 41 & 42 Vict. c. 56.

SECOND SCHEDULE.

Arbitration, etc.

SCHED. II. (1), (2), (3). Arbitration by committee, etc.

(1) For the purpose of settling any matter which under this Act is to be settled by arbitration, if any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within six months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the judge of the county court, according to the procedure prescribed by rules of court.

(3) In England the matter, instead of being setted by the judge of the county court, may, if the Lord Chancellor so authorises, be settled according to the like procedure, by a single arbitrator appointed by that judge, and the arbitrator so appointed shall, for the purposes of this Act, have all the powers of that judge.

Arbitration other than by Judge of County Court.

Under paragraph (1), which is substantially the same as that in the Act of 1897, provision is made for arbitration other than by the judge of the county court, and the judge has no supervision over such arbitration and its proceedings. Hence when an award had been made by a committee under the old Act, and the amount reduced by agreement, and later on the workman applied to the county court judge for review, the judge, on objection taken, held he had no jurisdiction to entertain the matter, and refused to hear the application. The workman appealed to the Court of Appeal. Again, on objection taken, the Court of Appeal held: "The county court judge has not heard or determined this case. It is quite plain that he declined to entertain jurisdiction, and the appeal therefore lies not here, but to the Divisional Court," *per* **Cozens-Hardy, M.R.**, *Howarth* v. *Samuelson*, 4 B. 287; and see also County Courts Act, 1888, s. 131.

(4) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court.

SCHED. II. (4). 52 & 53 Vict. c. 49. As to appeals and as to procedure in first instance.

Preliminary Objection.

The question of jurisdiction was involved in *Panagotis* v. *Pontiac* (*Owners of*). See further under sect. 11, where a seaman detained a ship. On its facts the decision seems warranted, but it is somewhat difficult to follow the reasons given. The dissenting judgment of **Farwell, L.J.**, so clearly states the law that evidently the variance was on how the facts should be regarded. This being so, we may take it that this case in no way disturbs the practice as now settled. Without division of opinion, the Court also declined to hear the appeal in *Homer* v. *Gough* under sect. 5, as there clearly the arbitrator had no jurisdiction at all to make any order. As to this also see further under sect. 5.

The same question was also involved in *Howarth* v. *Samuelson*, *supra*, under par. (3).

Form of Notice of Appeal.

By rule 71 of the Workmen's Compensation Rules, 1907, appeals under Sched. II., par. (4), have to be in accordance with the rules of the Supreme Court relating thereto, and by Order LIX., rule 10, it is directed:—

SCHED. II. (4). Appeals—Notice.

"The notice of motion shall state the grounds of the appeal, and whether all or part only of the judgment order or finding is complained of."

Thus in *Barton* v. *Scott*, 4 B. 15, the workman twice applied to have his award reviewed, and each time his application

SCHED. II. (4). Appeals—Notice.

was dismissed. On appeal the workman really relied on the evidence given at the first review, although in form the notice of appeal was from the second review. The first application had been dismissed on the grounds the applicant had not shown he had made reasonable efforts to obtain work, and the second that since the first hearing there had been no change of circumstances.

Cozens-Hardy, M.R., intimated he had read the notice of appeal and could not gather from it what was really the point they were asked to decide, and the Court held the notice was insufficient, and dismissed the appeal.

Time for Appeal.

SCHED. II. (4). Appeals—Time for.

In *Fox* v. *Battersea Borough Council*, 4 B. 261, the judge of the county court refused, in November, 1910, to record an agreement as not genuine, and in January, 1911, made an award. From both decisions the employers appealed. It was held they formed part of one and the same proceeding, and there was no necessity to have appealed within twenty-one days from the first order in November, 1910. Further, **Cozens-Hardy, M.R.**, observed that had it been necessary for leave to have been obtained for giving further time to appeal, he should certainly have granted it. See also under sect. 1 (3).

THE ATTENDANCE OF WITNESSES AND THE PRODUCTION OF DOCUMENTS.

SCHED. II. (4). Procedure.

Why the second part of this paragraph could not have been made into a distinct paragraph by itself, and made to precede the first part, which deals with appeals, is difficult to understand. However, it is as convenient to give here as anywhere else some of the miscellaneous decision dealing with evidence and practice which have recently been given by the Court.

Evidence—Generally.

SCHED. II. (4). Evidence

It is not sufficient that there should have been some evidence on which an arbitrator could have found a fact, unless it is also shown that he did in fact apply his mind to such evidence, and did so find (*Lee* v. "*Bessie*" (*Owners of*), W. N., 1911, 222).

Evidence. Statement to Doctor, etc.

SCHED. II. (4). Evidence—Statement to doctor.

In several cases no evidence of how an accident has occurred has been procurable other than that of the wife, doctor, or some one to whom the deceased has made statements, and which are not admissible. In *Amys* v. *Barton*, W. N., 1911, 205, where a man died from a wasp sting, it was sought to give the statement made to the doctor to explain how it happened. This was not admitted. A man may tell his doctor what his symptoms are, from what he is suffering, and how it was caused, by a blow, a chill, a sting, a scratch, a strain, a bite, etc., and all this the doctor may tell the Court as part of the *res gestæ*, but it is not part of the *res gestæ* when he would give the man's account of how he came to have been bit or stung, etc. And the distinction is clear. The doctor can check for himself and be cross-examined as to whether he really thought the injury was due to a blow, etc., but there is no means of checking the statement, if permitted, how the blow, etc., actually happened. It might be the man was interested in deliberately misleading his doctor. The accident might have happened under circumstances of which he was ashamed, and he might easily have wished to attribute it to more reputable causes, or, knowing he was dying, have thought to provide for his family. If the Irish case of *Wright* v. *Kerregan*, 45 Ir. L. T. 82, goes further than this, which is very doubtful, for the headnote is not borne out by the judgments; it is not to be followed. The leading case is *Gilbey* v. *G. W. R.*, 102 L. T. 202, which correctly states the law.

Evidence. Onus of Proof.

SCHED. II (4). Evidence—Onus of proof.

The question of *onus* of proof was discussed and became material in the Scotch case of *M'Ghee* v. *Summerlee Iron Co.*, 48 S. L. R. 807. We have had to somewhat lengthily consider the same point under par. 3 of Schedule I. under the heading *Able to Earn*, sub-heading *Suitable Employment*. In this case a miner lost his eye by an accident. On February 14, 1910, the medical referee reported him fit for work. The employers then applied to end or diminish the compensation. At the hearing

SCHED. II. (4). Evidence—Onus of proof.

the workman proved that since the report he had lost the other eye and was then totally incapacitated, and the Sheriff found this was so, but held it was not proved the blinding of the remaining eye was due to the accident. He held the *onus* was on the man to prove this. The employers had proved that in February, 1910, the incapacity had ceased. This they had to do. After a special hearing as to the cause of the subsequent blindness, the Sheriff found "that it is not proved that the said condition is due to sympathetic affection." Further, he held that the *onus* of proof was on the workman to show that the new incapacity which thus supervened and which he sought to establish was due to the accident, and that he had not discharged it. Equally, he said, he would have held that if the *onus* had been the other way the employers had failed to discharge it. Accordingly he found for the employers, and his finding was upheld.

In England we do not quite agree with the Scotch law as to *onus* as thus stated. With us if there is *no* evidence the party loses who has to prove his case, but directly evidence is given the question of *onus* is at an end, and the arbitrator or judge has to find on the evidence as best he can. It is not open to him to say "the evidence is so equally balanced I cannot decide": It is his duty to decide, though there is no reason he should not adjourn the case for further evidence to be given. **Bowen, L.J.**, well puts our view of the law in *Abrath* v. *N. E. R.*, 1 Q. B. D. at p. 456: "The question of *onus* of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of *onus* of proof."

Practice. Affidavits, etc., in Court of Appeal.

SCHED. II. (4). Practice.

In *Turner* v. *Bell*, 4 B. 63, an arbitrator, holding the matter was *res judicata*, declined to take any notes. On appeal, the Court accepted an affidavit of the solicitor as to what had taken place.

In *Lee* v. "*Bessie*" (*Owners of*), W. N., 1911, 222, the Court

of Appeal allowed a newspaper report to be read, not as admitting such as evidence, but as a statement of counsel present at the trial who adopted it as substantially correct. SCHED. II. (4). Practice.

New Trial.

In *S. E. & C. R.* v. *Ewell*, not yet reported, an official called by the company was also subpœnaed by the other side. The company's advisers, seeing him with them, thought he was going to "sell" them, so—not knowing of the subpœna—told him he would not be required and could go back to his work. This he did, with the result when the other side called him he was not available. These facts clearly warranted a new trial, which was agreed upon. So also a new trial was ordered in *Jessop* v. *Maclay*, not yet reported, where the arbitrator had refused an adjournment of the hearing. Here, owing to the sailing of their ship within three days of the application for arbitration, the owners were unable to take the evidence necessary for them to have to substantiate their defence. SCHED. II. (4). Practice—New trial.

Practice. Settlement where Infants.

In *Coulson* v. *The Worshipful Company of Drapers*, not yet reported, on appeal the parties agreed to settle, and they fixed the compensation at 120*l.*, instead of 190*l.* They then asked for the sanction of the Court. On it appearing that there were infants and that they were not separately represented, the Court felt they could not then give it, but referred it to the official solicitor for him to decide and report to them if it was for their benefit. So it was ordered he was to have the assistance of counsel to help him in arriving at a conclusion, if he required it. If this is the usual machinery to be invoked in the cases where there are infants it hardly seems there will be many settlements if the clients are consulted. So it seems foreign to the spirit of the Act. Under the award, the £190 was to have been apportioned by the registrar or the arbitrator in the usual way. Now, on appeal, it was to the joint interest of all the applicants, the infants included, if they could not get the full amount to SCHED. II. (4). Practice—Infants.

SCHED. II. (4). Practice—Infants.

get as large a sum in settlement as possible. So far there was no conflict of interest, and so far one counsel could and did well represent them all. When he advised taking the smaller sum he was as much acting in the interest of the infants as of the others entitled, and was every whit as able to judge for them as the official solicitor. The conflict of interest would only arise when the amount had to be divided, and it would be the same whether it was 190*l.* or 120*l.*, or any other sum. Then why should not the settlement have been allowed and the division of the amount have been referred to the arbitrator to be made in the usual way.

Public Authorities Act, 1893.

SCHED. II. (4). Public Authorities Act.

In *Fry* v. *Mayor, etc. of Cheltenham*, W. N., 1911, 199, it was held that the Public Authorities Act, 1893, does not apply to an arbitration under the Act which is made a statutory incident to a contract of service.

SCHED. II. (5). Referee as assessor.

(5) A judge of county courts may, if he thinks fit, summon a medical referee to sit with him as an assessor.

SCHED. II. (6). Appearance of parties.

(6) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

SCHED. II. (7). Costs.

(7) The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the committee, arbitrator, or judge of the county court, subject as respects such judge and an arbitrator appointed by him to rules of court. The costs, whether before a committee or an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules and such taxation may be reviewed by the judge of the county court.

SCHED. II. (8). Death, etc. of arbitrator.

(8) In the case of the death, or refusal or inability to act, of an arbitrator, the judge of the county court may, on the application of any party, appoint a new arbitrator.

SCHED. II. (9). Record of agreement.

(9) Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the committee or arbitrator, or by any party interested, to the registrar of the county court, who shall, subject to such rules, on being satisfied as to its

genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment. SCHED. II. (9). Record of agreement.

Provided that—

(*a*) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and

(*b*) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this Act and the employer, in accordance with rules of court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just; and

(*c*) the judge of the county court may at any time rectify the register; and

(*d*) where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge, who shall, in accordance with rules of court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; and

(*e*) the judge may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum, or of an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just.

This paragraph deals with the recording of agreements or awards made otherwise than by the judge of the county court.

SCHED. II. (9).

Genuineness of Agreement.

Record of agreement—Its genuineness.

Directly they are so made, and whether they are express or only to be implied from the acts of the parties, *e.g.*, by the paying of compensation weekly, either party is entitled to have this agreement recorded under this paragraph. The first point upon which the registrar has to satisfy himself is that the agreement sent for record is genuine. This does not give him any authority to inquire into the adequacy or desirability of the agreement, or in fact into anything other than was entered into as it purported to be (*Fox* v. *Battersea Borough Council*, 4 B. 261, discussed under sect. 1 (3)).

Actual Agreement only to be Recorded.

SCHED. II. (9).

Actual agreement to be recorded.

Subject to the provisoes the registrar is only entitled to record the actual agreement between the parties, and neither he nor they nor the judge may add anything to it or vary it. It is strange the number of times the Court of Appeal have had to say this. In *M'Carthy* v. *Stapleton-Bretherton*, 4 B. 281, the agreement was to pay compensation during total incapacity. The workman tried to register an agreement to pay also during partial incapacity. Here incidentally it may be remarked that the fact that the agreement cannot also be registered for partial incapacity does not mean that the workman cannot recover for it. It simply means that when total disablement comes to an end a new agreement must be made and recorded, and failing agreement the amount payable must be settled by arbitration on application being made in the usual manner. In *Lunt* v. *Sutton Heath Collieries*, 4 B. 219, the Court of Appeal refused to order the agreement tendered to be recorded because it did not agree with the agreement as made. In *Shore* v. "*Hyrcania*" (*Owners of*), 4 B. 207, the workman added to an agreement to pay during total incapacity the words "until the same shall be ended, diminished or increased by order of the court or by agreement between the parties." The arbitrator refused to record the agreement with the additions, and the appeal from his decision was

dismissed as quite hopeless; and the same result for the same reason happened in *Maundrell* v. *Dunkeston Collieries*, 4 B. 76.

SCHED. II. (9). Actual agreement to be recorded.

In the case of *Phillips* v. *Vickers, Sons and Maxim*, W. N., 1911, 192, the same principle was again enforced. An arbitrator ordered the registration of an agreement which was to be implied from the payment of 16*s.* 3*d.* as if it were general in its terms. The respondents proved that it was a condition that the payment should only be made so long as the workman obtained a certificate from their doctor every fortnight that he was still incapacitated. It was again held no agreement could be registered other than was actually entered into.

Record of Agreement after Workman's Recovery.

SCHED. II. (9). Record after workman's recovery.

Under the old Act an agreement could practically be recorded at any time, whether stale or otherwise. This is now modified by proviso (a) which has been added to the paragraph. Now if a workman has returned to work and is earning his original wages his employer is entitled to object to the recording of the agreement, or to its being recorded except on terms.

In the case of the *London and North Western Railway* v. *Taylor*, 4 B. 11, a workman had been injured, and had received compensation, but did not record any agreement. He recovered and returned to work at full wages for nearly a year. Then he had a nervous breakdown, due, he said, to the accident; to influenza, said his employers. He applied to record an agreement to pay him compensation. His employers objected on the ground he had recovered. Alternatively they asked that if an agreement were recorded there should be a stay of all proceedings under it pending their application to review. This latter course the arbitrator adopted, and on the review he accepted the employers' theory of the man's breakdown, and ended the agreement. On the hearing of the appeal the further point was taken that an arbitrator has no power to terminate an agreement, though he may end the weekly payments, and if there is at any time a recrudescence of the injury, whether payments are ended or not, the man is entitled to ask for a review of the original agreement.

SCHED. II. (9). **Record after workman's recovery.**

This point the court evaded in this case, as the recorded agreement was for payments to be made until ended, and as they had been ended the agreement automatically ended with them. However, in the Scotch case of *Cadenhead* v. *Ailsa Shipbuilding Co.*, [1910] S. C. 1129, the point was raised and it was definitely decided that there was no right to a new award on the recrudescence of the injury. (See also under Sched. I. (16), *Review*.)

In *Turner* v. *Bell*, 4 B. 63, a man told his employers he had ruptured himself by accident, and they paid him compensation for twenty-one weeks. Something aroused their suspicion and they then stopped their payments and also disputed the accident itself. The man applied for arbitration, claiming that the tubercular disease of the testicles from which he suffered was caused by the accident. The arbitrator found it had no connection with the alleged accident, and made an award in favour of the employers.

Some months later the workman applied to record an agreement implied from the payments made him, but the judge held the matter was *res judicata*, and declined to take any notes.

The solicitor made an affidavit of what took place, which the Court of Appeal accepted. The application that the case ought to be remitted to the arbitrator to hear was treated as a substantive appeal and dismissed on its merits.

Suppose the workman whilst in receipt of payments had registered the agreement, what then would have been the position of the employers? Probably on fraud being proved the Court would set aside any agreement; but supposing fraud could not have been sufficiently shown to justify this measure, then the logic of the position would have been that the employers admitted the accident and the consequent rupture, but they applied for review on the ground of change of circumstances, the change being the man no longer suffered from rupture, and that if he suffered at all it was from another and distinct cause, viz., tuberculosis.

In *Frogbrook* v. *Potts*, 4 B. 266, an employer paid his apprentice full wages of 10*s*. a week, under the mistaken impression he

was an infant. When he discovered he was of full age he declined to pay more than half, whereupon the workman applied to have the agreement recorded. The arbitrator refused, and as proviso (b) did not apply it was doubtful if he had a right to do so, and the Court of Appeal suggested a settlement at 7*s.* 6*d.* a week, subject to review, and gave the workman his costs. Unless the employer could prove fraud, he would have been wiser to have at once agreed to the recording of the agreement and then asked for review. It would have cost far less.

SCHED. II. (9). Record after workman's recovery.

Record of Agreements for Redemption.

Thus far the Court deals with agreements purely ministerially, its province being to determine, are they genuine or is there any reason under proviso (b) for their not being recorded or only recorded on terms. But under proviso (e) it is the duty of the Court to inquire not merely into the genuineness of the agreement but into its adequacy as well. Thus in "*Segura*" (*Owners of*) v. *Blampied*, 4 B. 192, the registrar, thinking the amount agreed upon to compound was too small, referred it to the judge. On his holding he had only to inquire into the fact had the agreement been made or had it not, the Court referred it back to him to determine the question of adequacy as well. But note, this does not entitle him to say what amount shall be given. If the amount is inadequate he can say so and refuse to record the agreement; but this is the limit of his powers (*Mortimer* v. *Secretan*, [1909] 2 K. B. 77). *Beech* v. *Bradford Corporation*, 4 B. 236, is a curious case. The corporation agreed to pay their workman a lump sum to settle their liability. The judge thought the amount inadequate, and refused to record the agreement. The workman then applied for arbitration, when the judge found the amount already paid sufficient, and that the man was not suffering from the accident, and ended the payments. It was then objected, but without success, that, as a matter of procedure, it was not open to the arbitrator to find against the workman on this application. But the Court held that on refusal to record the agreement the matter recommenced *de novo* on an application

SCHED. II. (9). Record of agreements for redemption.

SCHED. II. (9). Record of agreements for redemption.

for arbitration being made. A similar result happened in *Marriott* v. *Brett*. An arbitrator refused to allow an infant's claim to be compromised, and when the case came to be heard by him he found for the master, as the accident did not arise out of the employment.

SCHED. II. (10). Agreements for redemption must be registered.

(10) An agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with this Act shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment, and an agreement as to the amount of compensation to be paid to a person under a legal disability or to dependants, if not so registered, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the compensation is payable from liability to pay compensation, unless, in either case, he proves that the failure to register was not due to any neglect or default on his part.

SCHED. II. (11). Jurisdiction.

(11) Where any matter under this Act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district prescribed by rules of court, without prejudice to any transfer in manner provided by rules of court.

SCHED. II. (12). Duties of judge of county court —Rules of Court to be made.

(12) The duty of a judge of county courts under this Act, or in England of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorises rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

SCHED. II. (13). No court fees.

(13) No court fee, except such as may be prescribed under paragraph (15) of the First Schedule to this Act, shall be payable by any party in respect of any proceedings by or against a workman under this Act in the court prior to the award.

SCHED. II. (14). Good receipt by whom.

(14) Any sum awarded as compensation shall, unless paid into court under this Act, be paid on the receipt of the person to whom it is payable under any agreement or award, and the

solicitor or agent of a person claiming compensation under this Act shall not be entitled to recover from him any costs in respect of any proceedings in an arbitration under this Act, or to claim a lien in respect of such costs on, or deduct such costs from, the sum awarded or agreed as compensation, except such sum as may be awarded by the committee, the arbitrator, or the judge of the county court, on an application made either by the person claiming compensation, or by his solicitor or agent, to determine the amount of costs to be paid to the solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court. SCHED. II. (14).

(15) Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration. SCHED. II. (15). Submission to medical referee.

Confusion exists between reference under this paragraph and under par. (15) of Sched. I., which provides solely for reference by the joint request of the parties. As to this, see further under the previous paragraph.

By No. 20 of the regulations of June 24, 1907, it is required as follows:—

> 20. Before making any reference, the . . . judge shall be satisfied after hearing medical evidence tendered by either side that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter.

Thus, in *Henricksen* v. *Swanhilda* (*Owners of*), 4 B. 233, the owners took the objection that the judge had made a reference under this paragraph before it was permissible under the conditions laid down in this regulation, viz., where there was a conflict of evidence. With this the Court did not agree, and held the reference was correctly made. Equally they did so in the case of *Carolan* v. *Harrington*, 27 T. L. R. 486, where the defendants, finding the decision of the referee as to the cause of death was against them, took the objection the arbitrator had no power to refer, as the regulations were framed only to deal with a workman when alive and whom the referee could see and examine. The words "subject to regulations" only limit the power of the arbitrators in matters they deal with, not in those on which they are silent. Hence the powers are those found in the words of this paragraph.

SCHED. II. (15). Submission to medical referee.

So it would seem such objection, even if valid, to have been successful, ought to have been taken before and not after the reference was made.

SCHED. II. (16). Powers conferred on committees, etc.

(16) The Secretary of State may, by order, either unconditionally or subject to such conditions or modifications as he may think fit, confer on any committee representative of an employer and his workmen, as respects any matter in which the committee act as arbitrators, or which is settled by agreement submitted to and approved by the committee, all or any of the powers conferred by this Act exclusively on county courts or judges of county courts, and may by the order provide how and to whom the compensation money is to be paid in cases where, but for the order, the money would be required to be paid into court, and the order may exclude from the operation of provisoes (*d*) and (*e*) of paragraph (9) of this schedule agreements submitted to and approved by the committee, and may contain such incidental, consequential, or supplemental provisions as may appear to the Secretary of State to be necessary or proper for the purposes of the order.

SCHED. II. (17). Application to Scotland.

(17) In the application of this Schedule to Scotland—

(*a*) "County Court judgment" as used in paragraph (9) of this schedule means a recorded decree arbitral:

(*b*) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorised in writing to appear for them and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same and remit to the sheriff with instruction as to the judgment to be pronounced, and an appeal shall lie from either of such divisions to the House of Lords:

39 & 40 Vict. c. 70.

(*c*) Paragraphs (3), (4), and (8) shall not apply.

SCHED. II. (18). Application to Ireland.

(18) In the application of this schedule to Ireland the expression "judge of the county court" shall include the recorder of any city or town, and an appeal shall lie from the Court of Appeal to the House of Lords.

THIRD SCHEDULE.

Description of Disease.	Description of Process.
Anthrax.	Handling of wool, hair, bristles, hides, and skins.
Lead poisoning or its sequelæ	Any process involving the use of lead or its preparations or compounds.
Mercury poisoning or its sequelæ,	Any process involving the use of mercury or its preparations or compounds.
Phosphorus poisoning or its sequelæ.	Any process involving the use of phosphorus or its preparations or compounds.
Arsenic poisoning or its sequelæ	Any process involving the use of arsenic or its preparations or compounds.
Ankylostomiasis . . .	Mining.

Where regulations or special rules made under any Act of Parliament for the protection of persons employed in any industry against the risk of contracting lead poisoning require some or all of the persons employed in certain processes specified in the regulations or special rules to be periodically examined by a certifying or other surgeon, then, in the application of this schedule to that industry, the expression "process" shall, unless the Secretary of State otherwise directs, include only the processes so specified.

GENERAL INDEX.

To make this Index of wider utility the references given are to the sections and paragraphs of the Act and its schedules. These will enable the practitioner on turning up a reference and finding no new decision on it to at once refer to his text-book and there find, provided it has not been published earlier than the Michaelmas Term of 1910, the information he requires. In some cases the rules should be also read. Though not printed here, it is thought well to give the reference to them as a reminder they should be looked at.

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